Volume 8, No. 3, Pages 591 to 844, January 25 - February 5, 1993

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

Sherrie P. Marshall

Andrew C. Barrett

Ervin S. Duggan

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 8 FCC Rcd 1 (1993)

*Commissioner Quello designated as Chairman effective February 5, 1993.

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office on a subscription basis

Federal Communications Commission Record

Volume 8
Issue 3

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... v

Table of Rulemaking Numbers..... vi

Table of Localities..... vii

Table by Subject Matter..... viii

Table by Statutory and Rule Provisions..... xi

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 591

Federal Communications Commission Record

Table of Cases
Volume 8
Issue 3

Case Name	Page
Amendment of Part 43 - Elimination/Revision of Requirements	738
Amendment of Part 73 - Equipment Standard for AM Stereo	688
Amendment of Parts 0 and 1 - Reorganization of Bureaus	799
Amendment of Section 1.2002 - Information Required	776
Amendment of Section 1.80 - Forfeiture Payment Procedures	658
Application Processing Practices - Microwave/Broadcast Services	775
Asian American Telecom	647
Atkins Broadcasting	674
Bellevue Independent School District	633
Cable TV Act of 1992 - Cable Systems and Electronic Equipment	725
Cable TV Act of 1992 - Home Shopping Station Issues	660
Carroll, William L.	814
Carrus, Richard M.	608
Cascade Utilities, Inc.	781
Central Florida Educational Foundation, Inc.	631
Chickasaw Telephone Company	600
Communications Satellite Corporation	638
Communications Satellite Corporation	722
Communications Services, Inc.	653
Competitive Telecommunications Association	682
Encryption Technology for Satellite Cable Programming	697
Financial Satellite Corporation	803
GTE Corporation	746
GTE Hawaiian Telephone Company, Inc.	724
GTE Railfone Incorporated	752
Glasford Telephone Company	651
Gulf Atlantic Media Corporation	603
IDB Aero-Nautical Communications, Inc.	807
Indiana Utility Regulatory Commission	745
J.C. Maxwell Broadcasting Group, Inc.	784
K2 Radio, Limited Partnership	594
Kodiak Enterprise, Incorporated	768
LCI International	762
LCT Long Distance, Inc.	747
LEOSAT Corporation	668
Lawton Chiles, Bob Martinez, and Bill Nelson	714
Litel Telecommunications Corp.	652
MSS Above 1 GHz Negotiated Rulemaking Committee	815
McCaw Space Technologies, Inc.	804
Micronesian Telecommunications Corporation	748
Micronesian Telecommunications Corporation	750
Micronet, Inc.	805

Case Name	Page
Milford Broadcasting Co.	680
Montachusett Broadcasting, Inc.	598
Montana Public Safety Plan	596
NYNEX Telephone Companies	693
National Association for Information Services	698
National Exchange Carrier Association, Inc.	761
National Exchange Satellite, Inc.	636
National Telephone Services, Inc.	654
Nevada Public Safety Plan	606
On Call Communications, Inc.	806
Oregon Public Safety Plan	597
PacTel Cellular	742
Pegasus Broadcasting of San Juan, Inc.	777
Philippine Long Distance Telephone	755
Physical Collocation Tariffs	607
Prescription of Revised Percentages of Depreciation	816
Professional Video Transmission Services Corporation	810
Prohibitions Against Broadcast Indecency	704
Ramapo Indian Hills Regional High School District	649
Rates for Dominant Carriers	741
Sacred Heart University	672
Salt City Communications, Inc.	683
Sunbelt, Limited Partnership	753
Table of Allotments, FM, Bethany Beach, DE	789
Table of Allotments, FM, Blanchard, LA	787
Table of Allotments, FM, Brighton, NY	793
Table of Allotments, FM, Douglas, GA and LaCrosse, FL	736
Table of Allotments, FM, Galliano and Buras Triumph, LA	785
Table of Allotments, FM, Greenfield and Halfway, MO	734
Table of Allotments, FM, Jupiter and White City, FL	731
Table of Allotments, FM, Lakewood, NY and Clarendon, PA	774
Table of Allotments, FM, Lamoni, IA	767
Table of Allotments, FM, Monticello, FL	733
Table of Allotments, FM, Mora, Bosque Farms and Socorro, NM	791
Table of Allotments, FM, Paris, TN	770
Table of Allotments, FM, Silver City, NM	765
Table of Allotments, FM, Spokane, WA	772
Table of Allotments, FM, Sun City, AZ	796
Table of Allotments, FM, Three Lakes, Newbold and Nakoosa, WI	763
Table of Allotments, FM, Yakima, WA	795
Tariff Filing Requirements for Nondominant Common Carriers	744
Teton Communications Incorporated	591
Texas State Technical College	664
Thomas, Kate F.	632
Western Pennsylvania Public Safety Plan	798
Wharton Independent School District	666

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 8
Issue 3

Delegated Authority or FCC Number	Page
DA 92 -1115	799
DA 92 -1755	680
DA 93 - 1	793
DA 93 - 7	736
DA 93 - 27	733
DA 93 - 28	734
DA 93 - 33	731
DA 93 - 49	596
DA 93 - 50	606
DA 93 - 51	597
DA 93 - 52	607
DA 93 - 53	647
DA 93 - 54	697
DA 93 - 56	651
DA 93 - 57	714
DA 93 - 58	652
DA 93 - 59	653
DA 93 - 60	693
DA 93 - 61	654
DA 93 - 62	763
DA 93 - 63	787
DA 93 - 64	785
DA 93 - 65	772
DA 93 - 66	770
DA 93 - 67	767
DA 93 - 68	765
DA 93 - 69	774
DA 93 - 70	789
DA 93 - 75	795
DA 93 - 77	775
DA 93 - 78	722
DA 93 - 79	724
DA 93 - 80	682
DA 93 - 81	777
DA 93 - 82	741
DA 93 - 86	745
DA 93 - 87	791
DA 93 - 88	761
DA 93 - 89	746
DA 93 - 90	747
DA 93 - 91	748
DA 93 - 92	750
DA 93 - 93	752
DA 93 - 95	762
DA 93 - 96	815
DA 93 - 97	796
DA 93 - 100	781
DA 93 - 107	803
DA 93 - 108	804
DA 93 - 109	805
DA 93 - 110	810
DA 93 - 111	806
DA 93 - 112	784
DA 93 - 115	798
DA 93 - 116	807
FCC 92 - 546	688
FCC 92 - 567	591
FCC 92 - 568	600
FCC 92 - 574	603
FCC 93 - 6	768
FCC 93 - 12	658
FCC 93 - 14	674
FCC 93 - 15	649
FCC 93 - 17	598
FCC 93 - 18	738
FCC 93 - 19	594
FCC 93 - 20	633
FCC 93 - 21	638
FCC 93 - 22	776
FCC 93 - 23	668
FCC 93 - 24	636
FCC 93 - 30	725
FCC 93 - 35	660
FCC 93 - 36	664
FCC 93 - 37	666
FCC 93 - 40	816
FCC 93 - 41	742
FCC 93 - 42	704
FCC 93 - 43	672
FCC 93 - 45	698
FCC 93 - 46	755
FCC 93 - 48	683

Delegated Authority or FCC Number	Page
FCC 93 - 51	744
FCC 93 - 52	753
FCC 93 - 55	814
FCC 93D - 2	608
FCC 93R - 1	631
FCC 93R - 2	632

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 8
Issue 3

Docket Number	Page
CC Dkt.No.87 - 313	741
CC Dkt.No.91 - 141	607
CC Dkt.No.91 - 141	745
CC Dkt.No.92 - 166	815
CC Dkt.No.92 - 223	704
CC Dkt.No.92 - 256	746
CC Dkt.No.93 - 5	738
ET Dkt.No.92 - 298	688
ET Dkt.No.93 - 7	725
MM Dkt.No.88 - 366	731
MM Dkt.No.89 - 311	683
MM Dkt.No.90 - 96	753
MM Dkt.No.90 - 333	791
MM Dkt.No.90 - 344	814
MM Dkt.No.90 - 501	632
MM Dkt.No.90 - 522	736
MM Dkt.No.91 - 83	608
MM Dkt.No.91 - 318	763
MM Dkt.No.92 - 33	631
MM Dkt.No.92 - 49	734
MM Dkt.No.92 - 66	796
MM Dkt.No.92 - 142	793
MM Dkt.No.92 - 173	774
MM Dkt.No.92 - 177	767
MM Dkt.No.92 - 232	733
MM Dkt.No.92 - 240	795
MM Dkt.No.92 - 317	680
MM Dkt.No.93 - 4	674
MM Dkt.No.93 - 8	660
MM Dkt.No.93 - 9	765
MM Dkt.No.93 - 10	770
MM Dkt.No.93 - 11	772
MM Dkt.No.93 - 12	785
MM Dkt.No.93 - 13	787
MM Dkt.No.93 - 14	789
PP Dkt.No.92 - 234	697
PR Dkt.No.92 - 267	596
PR Dkt.No.92 - 268	606
PR Dkt.No.92 - 269	597
PR Dkt.No.92 - 274	798

Table of Cases by Rulemaking Number
Volume 8
Issue 3

Rulemaking Number	Page
RM - 6230	731
RM - 6531	731
RM - 7340	791
RM - 7493	736
RM - 7499	736
RM - 7518	791
RM - 7853	763
RM - 7889	763
RM - 7890	763
RM - 7924	734
RM - 7940	796
RM - 8009	734
RM - 8014	793
RM - 8033	774
RM - 8043	767
RM - 8077	733
RM - 8085	795
RM - 8150	770
RM - 8151	785
RM - 8152	765
RM - 8155	789
RM - 8156	787
RM - 8164	772

Table of Cases by City
Volume 8
Issue 3

City/State	Page	City/State	Page
Amarillo, TX	674	Lubbock, TX	664
Bethany Beach, DE	789	Milford, IA	680
Blanchard, LA	787	Monticello, FL	733
Bosque Farms, NM	791	Mora, NM	791
Bowie, TX	633	Nakoosa, WI	763
Brighton, NY	793	New Port Richey, FL	603
Brundidge, AL	753	Newbold, WI	763
Chalmers, TX	666	Paris, TN	770
Clarendon, PA	774	Port Edwards, WI	763
Douglas, GA	736	Port St. Lucie, FL	608
Fitchburg, MA	598	Seattle, WA	768
Franklin Lakes, NJ	649	Seligman, MO	734
Galliano, LA	785	Sheridan, WY	594
Greenfield, MO	734	Silver City, NM	765
Halfway, MO	734	Socorro, NM	791
Huntington Station, NY	672	Spokane, WA	772
Huntsville, AR	734	Sun City, AZ	796
Idaho Falls, ID	591	Syracuse, NY	683
Jackson, MS	784	Tampa, FL	714
Jupiter, FL	731	Three Lakes, WI	763
LaCrosse, FL	736	Triumph, LA	785
Lakewood, NY	774	Union, MS	632
Lamoni, IA	767	Union Park, FL	631
Lebanon, OH	814	White City, FL	731
		Yakima, WA	795

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Failure to prosecute	632
Integration of ownership (qualitative), broadcast experience	814, 814
Integration of ownership into management, effectuation	753
Limited partnership	753
Orders or Notices	
Translator	608
Broadcast Radio Services - General Rules	
Applications for authorization	
Amendment of applications	631
General information	
Written statements of fact, the Commission may require	674
Licenses and permits	
Multiple ownership of broadcast stations in the same service	594
Policies of the FCC	
Educational broadcast stations, non-commercial nature of	784
Program contents	
Telephone conversations for broadcasting, recording of	597, 598
Records kept by stations	
Equal employment opportunity program	603
Broadcasting - AM Stations	
Services	
Stereophonic, equipment necessary for	688
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	763, 772, 770, 767 765, 793, 791, 796 787, 785, 789, 795 733, 734, 736, 731 774
Restrictions	
Subscription services/storecasting, non-use of main channel for	674
Cable Television Service	
Cable television service	660

Subject	Page
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	806, 724, 747, 750, 752
Common Carriers/Affiliates: Reports	
Contracts and concessions with respect to communication traffic	755
Pensions and benefits, reports on	738
Reports of carriers and certain affiliates, annual	738
Common Carriers: Miscellaneous Rules	
Enhanced services (computer) and customer-premises equipment	693
Communications Act of 1934	
Common Carriers	
Charges, schedules of	654, 755
Complaints to the commission	755
Extension of lines, certificate for	638, 647, 805, 810, 806, 807, 722, 724, 747, 750, 752, 755
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	597, 598, 603, 784, 755
Procedural and Administrative provisions	
Inquiry by Commission on its own motion	755
Joinder of parties	755
Radio, provisions for	
Candidates for public office, facilities for	714
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	603, 803
Construction permits	674
License for radio communication or transmission of energy	674
Practice and Procedure	
Common carriers: applications under Title II Act	
Licenses, cable landing	748
Common carriers: complaints	
Formal or informal	682, 652, 653, 762
Information, general	
Rules, suspension, amendment, waiver	693
Proceedings, miscellaneous	
Forfeiture proceedings	603, 591, 658, 742, 755
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petition for	649

Subject	Page
Public Mobile Service	
Applications and licenses-filing requirements	
Communications by radio, authorization required	742
Defective applications	600
Forms and permissive changes or minor modifications	591
Developmental authorizations	
Report, items to be covered in	742
Domestic public cellular radio telecommunications service	
Applications, amendment of	600
Frequencies available	600
Special Broadcast Services	
FM broadcast translator and booster stations	
Power limitations	672
Instructional TV fixed service	
Applications, selective procedures for mutually exclusive	664, 666
Licensing requirements and eligibility factors	664, 666

TABLE OF STATUTORY AND RULE PROVISIONS

Page

001.080 Forfeiture Provisions 603
001.106 Petitions for reconsideration 649
001.115 Application for Review 814
001.115 Application for Review of Action 683
001.1202, 1.1203, & § 1.1206 745
001.200 Declaratory Rulings 781
001.711 Formal or informal complaints 652
001.711 Formal or informal complaints 653
001.711 Formal or informal complaints 682
001.711 Formal or informal complaints 762
001.767 Cable Landing License 748
001.800 Forfeiture proceedings 658
001.800 Forfeiture proceedings 755
001.800 Forfeiture porceedings. 591
001.800 Forfeiture proceedings. 742
006.900, Access Charges 651
001.106 Petitions for reconsideration 777
017.310 Specifications for the lighting of antenna 777
021.700 Eligibility 775
022.020 Defective applications 600
022.300 Authorization required. 742
022.406 Developmental report required. 742
022.900 Standfard application forms and permissive changes o 591
022.902 Frequencies 600
022.918 Amendment of cellular applications 600
043.210 Annual Reports of Carriers and Certain Affiliates 738
043.420 Reports of Pensions and Benefits 738
043.510 Contracts and concessions 755
063.001 Contents of Application 747
063.001 Contents of Application 805
063.001 Contents of Application 806
063.001 Contents of Application 810
063.001 Contents of Applications 752
063.001 Contents of Applications 807
063.001 Contents of Application 750
063.010 Content of Application 647
063.010 Contents of Application 724
063.010 Contents of Applications 638
064.702(e); 1.3 693
007.480Notification of extinguishment 777
007.500Cleaning and repainting 777
073.0503 Noncommercial FM Service; Promotional Announcements 784
073.1015 Truthful written statements and responses to Commi 674
073.1206 Broadcast of Telephone Conversations 598
073.128 AM Stereophonic Broadcasting 688
073.202 FM Table of Allotments 731
073.202 FM Table of Allotments 733
073.202 FM Table of Allotments 734
073.202 FM Table of Allotments 736

073.202 FM Table of Allotments 763
073.202 FM Table of Allotments 767
073.202 FM Table of Allotments 774
073.202 FM Table of Allotments 789
073.202 FM Table of Allotments 791
073.202 FM Table of Allotments 793
073.202 FM Table of Allotments 795
073.202 FM Table of Allotments 796
073.2080 Equal Employment Opportunity 603
073.277 Permissible transmissions 674
073.3522 Amendment 631
073.3555 Multiple Ownership 594
073.3999 Enforcement of 18 U.S.C. 1464 704
073.4163 Noncommercial Nature of Ed. B/C Stations 784
073.509 Prohibited overlap 649
074.600 Eligibility for license 775
074.913 Selection for MX ITFS Applications 633
074.913 Selection Procedure for Mutually Exclusive 664
074.913 Selection Procedure for Mutually Exclusive 666
074.931 Purpose and Permissiable service 633
074.931 Purpose and Permissible Service 664
074.931 Purpose and Permissible service 666
074.932 Eligibility and Licensing Requirements 633
074.932 Eligibility and Licensing Requirements 664
074.932 Eligibility and Licensing Requirements 666
001.2002 Applicants required to submit information 776
300.154 Provisions Relating to the Commission 755
300.203 Schedules of Charges 755
300.203 Schedules of Charges 781
300.208 Complaint to the Commission 755
300.214 Extension of Lines 638
300.214 Extension of Lines 647
300.214 Extension of Lines 722
300.214 Extension of Lines 724
300.214 Extension of Lines 747
300.214 Extension of Lines 750
300.214 Extension of Lines 752
300.214 Extension of Lines 755
300.214 Extension of Lines 806
300.214 Extension of Lines 807
300.214 Extension of Lines 810
300.214 Leasing of Lines 805
300.301 License for radio communication or transmission of 674
300.309 Action Upon Application 804
300.309 Action Upon Applications 603
300.309 Action Upon Applications 803
300.315 Facilities for candidates for public office 714
300.319 Construction permits 674
300.340 Cable Landing License Act 748
300.399B Public B/C Stations; Advertisements 784
300.403 Inquiry by the Commission on its Own Motion 755
300.411 Joinder of Parties 755
300.503 Forfeitures in Cases of Rebates and Offsets 603
300.503 Forfeitures in Cases of Rebates and Offsets 755

300.503 Forfeitures in Cases of Rebates and Offsets 777
300.503(b) Forfeitures 784
300.503(b) Forfeitures (Memorandum Opinion & Order) 598
300.504 Provisions Relating to Forfeitures 603
300.752 Intl. Marit. Satl. Telecoms Act, Designated Operatin 638
300.753 Intl. Marit. Satl. Implementation of Policy 638
362, 000 Failure to get annual inspection 768
400.05554 Adjudications 781
47 CFR Part 61.52, 61.53, 61.54 744
47 CFR Part 64 746
500.035 - Integration, Quantitative 608
500.100 HDO 680
500.170 - Financial Qualification 608
500.3010 integration of ownership, broadcast experience 814
500.3025 integration of ownership, local residence 814
500.3040 integration of ownership into management, questions 753
500.3110 Failure to Prosecute 632
500.3170 financial qualifications 683
500.3220 limited partnership 753
74.1235, Waives Translator Power Limitations 672
Authority Delegated, Organization and Functions; Location of 799
Part 76 Cable Television Service 660

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Teton Communications Incorporated — File No. 63500-92-5-BFW

Notice of Apparent Liability for Forfeiture Penalty for Station KNKD736 in the Public Land Mobile Services at Idaho Falls, Idaho

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1992; Released: January 25, 1993

By the Commission:

I. INTRODUCTION

1. Teton Communications Incorporated (Teton) has filed a Petition for Reconsideration (Petition) which requests cancellation of the $15,000 forfeiture proposed by the Commission in a "Notice of Apparent Liability for Forfeiture" (*NALF*). *See Teton Communications Incorporated*, 7 FCC Rcd 1989 (1992). For the reasons discussed below, we grant in part Teton's Petition and reduce the forfeiture to $9,000.

II. BACKGROUND

2. On October 23, 1984, the Commission granted Teton authority to construct and operate base station facilities for Station KNKD736 on frequency 152.09 MHz at Idaho Falls, Idaho. Teton constructed the facilities and commenced operation prior to the October 23, 1985 expiration date of the construction permit without filing the required FCC Form 489 notifying the Commission of completion of construction of the Idaho Falls facilities. Because no FCC Form 489 had been filed, the Chief, Mobile Services Division, notified Teton, by letter dated June 27, 1991, that its authorization for Station KNKD736 had expired.[1] On July 26, 1991, Teton filed: (1) a petition for reconsideration of that determination; and (2) a request for Special Temporary Authority (STA) to continue to operate station KNKD736 pending Commission action on an application for reinstatement of the expired authorization, which was filed with the STA request. Teton's deleted authorization was reinstated after reconsideration. *See Public Notice*, Mimeo No. 20112 (released Oct. 8, 1991) (hereafter, *Reinstatement Public Notice*).

3. In the *NALF*, we found that because Teton commenced operation without timely filing FCC Form 489, it was in apparent violation of Section 22.9(b)(1) of the Commission's Rules[2] and that Teton's operation of the facility until July 26, 1991, constituted willful and continuing conduct within the terms of Section 503(b) of the Communications Act (the Act). Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), we found that the base forfeiture amount for failing to file required forms is $30,000 but we adjusted the forfeiture downward to $15,000 because of our finding that failing to file an FCC Form 489 is a relatively minor violation.

III. TETON'S PETITION

4. Teton asserts that the *NALF* is inconsistent with the *Reinstatement Public Notice* because, if the Commission determined that Teton's authorization did not expire, no forfeiture then could be possible. Teton also argues that the *NALF* cannot be issued for a purported failure to perform a single required act more than five years ago because Section 503(b)(6)(B) of the Act limits the statute of limitations to one year prior to issuance of the *NALF*. Teton further argues that it cannot be expected to produce a receipt copy of the misplaced FCC Form 489 when its obligation to maintain a copy "lasts no longer than the statute of limitations provided for within the Act" and, thus, Teton's failure to produce a copy does not prove any violation of the Commission's Rules occurred.

5. Teton also claims that both the *Policy Statement* and the *NALF* are at odds with the Eighth Amendment of the U. S. Constitution, which guarantees that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In support, Teton cites *Coker v. Georgia*, 433 U.S. 584 (1977) (*Coker*) and *Lockett v. Ohio*, 438 U.S. 586 (1978) (*Lockett*). Likewise, Teton contends that the *NALF* violates Article I, Section 9, Clause 3 of the Constitution, which prohibits passing any *ex post facto* law, because the *NALF* imposed an amount not existing when Teton's alleged violation occurred. Teton further claims there is no evidence that it intended to do any unlawful act or omission and, contrary to our finding in the *NALF*, Teton did not "repeatedly" engage in the act for which the forfeiture was issued because the *NALF* referenced only a single act. Teton contends that the *NALF* does not reflect Teton's history of overall compliance with the Commission's Rules, its voluntary disclosure of the violation, and its voluntary attempt to resolve the problem by filing its STA request and application for reinstatement. Teton further states that it has served the public interest. Teton requests that the *NALF* be canceled.

IV. DISCUSSION

6. We reject Teton's arguments that the *NALF* is inconsistent with the *Reinstatement Public Notice*. The *NALF* clearly pointed out that Teton constructed its authorized facilities but began operations without timely filing FCC Form 489; and the *NALF* was issued because of Teton's apparent violation of Section 22.9(b)(1), not for the apparent expiration of Teton's authorization. The *Reinstatement Public Notice* did not excuse Teton's failure to file FCC Form 489 and its continued operation of the facility.

7. Moreover, Teton's violation was repeated within the statutory construction of that term and, thus, we reject its arguments that it did not "repeatedly" engage in the act for which the forfeiture was issued. Section 312(f)(2) of the Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. [3] Teton's violation continued every day for the period beginning with the date it first commenced operations, which occurred sometime before October 23, 1985 (expiration date of the construction permit) to at least July 26, 1991 (the date Teton filed its STA request). *See supra*, para. 2. Thus, Teton's violation was "repeated" for purposes of Section 503(b) during this period. Part of this period of violation falls outside the statute of limitations, as Section 503 of the Act prohibits issuance of a notice of apparent liability for a violation occurring more than one year prior to the date of issuance of such notice. Contrary to Teton's assertion, the *NALF* was not issued for Teton's failing to file the FCC Form more than five years ago. Rather, the *NALF*, which was released March 19, 1992, was timely issued and did not violate any statute of limitations because it was issued within one year of the July 26, 1991 date. Although Teton began operating sometime before October 23, 1985 (the record is silent as to the exact date), without filing FCC Form 489, the *NALF* was issued for Teton's continued operation without filing within one year of the statute of limitations and does not encompass Teton's conduct when the violation began.

8. We also reject Teton's assertion that the fact that there is no FCC Form 489 on file with the Commission does not establish that Teton failed to file one. The fact that the Commission has no record of FCC Form 489 on file with the Commission is *prima facie* evidence that Teton never filed the Form in the first place. Further, Teton's failure to produce a copy of the Form 489 or other authoritative evidence lends additional support to our finding in the *NALF* that Teton failed to file the Form. Moreover, Teton's argument that it cannot be expected to keep a receipt copy of the Form 489 from the time it began operating the station beyond the statute of limitations period *vis - a - vis* the *NALF* is misplaced. On December 19, 1983, the Commission streamlined the application filing and licensing requirements and adopted the notice provisions of Section 22.9(b)(1).[4] In so doing, the Commission stated: "A copy of the filed Form 489 and the license [for a construction permit] will constitute the operating authority." *Revision and Update*, *supra* at 95 FCC 2d 774. Thus, not only was it in Teton's best interests to maintain a copy of its purported FCC Form 489 for as long as it has been operating the station, it was incumbent upon Teton to do so. *See* Sections 22.201(a) and (b) of the Commission's Rules, which requires retaining and posting of authorizations. Teton's maintaining a copy is probative as to whether Teton ever filed the Form 489. Significantly, Teton has never affirmatively asserted that it mailed or filed the requisite FCC Form 489.

9. We find no merit to Teton's arguments that the *Policy Statement* and *NALF* violate the Constitution. Regarding the Eighth Amendment:

> "Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (*Ingraham*).[5]

The *Policy Statement* and *NALF* involve civil regulatory functions of the Commission, not criminal-law functions. Moreover, the base forfeiture in the *Policy Statement* applied to Teton's violation is not excessive and, furthermore, the *Policy Statement* and the *NALF* do not violate the Constitution's *ex post facto* prohibitions. As discussed, *supra* para. 8, Teton's violation was "repeated" within the statutory construction of that term from the unspecified date Teton began operating to at least July 26, 1991. When Congress amended the Act in 1989 to increase substantially the maximum amounts of forfeitures that may be imposed under Section 503(b) and other sections of the Act,[6] Teton was still operating its station with no FCC Form 489 on file. The 1989 statutory increases in the Commission's forfeiture authority under Section 503(b) placed licensees on notice that violators of the Act or Commission Rules could be subject to substantial forfeitures. The *Policy Statement* merely proposed flexible guidelines for assessing forfeitures after the statutory Section 503(b) increases, and the *NALF* follows these guidelines with respect to the proposed amount.

10. We find nothing in the record to support Teton's claim that it voluntarily disclosed its failure to file the FCC Form 489. While Teton voluntarily filed its STA request and application for reinstatement, those filings appear to stem from matters involving Teton's authorization being listed as having expired and, thus, Teton cannot be deemed to have voluntarily disclosed its violation. As for Teton's claim that it attempted to resolve the problem, Teton is expected to take such actions in order to be in compliance with Commission Rules. *See Central Pennsylvania*, 22 FCC 2d 632 (1970). The fact that Teton may not have intended to violate the rule is irrelevant. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). As to Teton's assertion that it has a "history of overall compliance," however, we find nothing in the record contradicting Teton's claim. Consequently, we apply the history-of-overall-compliance downward adjustment criterion and reduce the forfeiture to $9,000.

V. CONCLUSION

11. Teton has justified reduction of the forfeiture based upon its history of prior compliance but has not justified reduction on any other grounds. As a result, we reduce the $15,000 forfeiture to $9,000.

VI. ORDERING PARAGRAPHS

12. Accordingly, IT IS ORDERED that the Petition for Reconsideration in the above-captioned proceeding, filed by Teton Communications Incorporated, IS GRANTED TO THE EXTENT INDICATED ABOVE and IS DENIED in all other aspects.

13. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. Sec. 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, that Teton Communications Incorporated SHALL FORFEIT to the United States the sum of nine thousand dollars ($9,000) for violation of Section 22.9(b)(1) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument, noting

on its payment the File Number of the above-captioned proceeding, to the Commission within thirty (30) days of the release date of this Order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

14. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. Sec. 504(a).

15. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Teton Communications Incorporated by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Common Carrier Bureau also issued a public notice listing the proposed deletion of Teton's expired authorization. *See Public Notice*, Mimeo No. 13752 (released July 1, 1991).

[2] Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

The *NALF* pointed out that although Teton believed it had timely filed a notice of completion of construction, Teton could not find a copy in its files, and, moreover, there was no FCC Form 489 in the Commission's files.

[3] *See* H. R. Rep. No. 97-765, 97th Cong., 2d Sess. 50-51 (1982); *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[4] *Revision and Update of Part 22 of the Public Mobile Radio Service Rules*, 95 FCC 2d 769 (1983) *(Revision and Update), recon. granted*, 101 FCC 2d 799 (1985), *further recon. granted*, 2 FCC Rcd 1798 (1987).

[5] *Ingraham* also provided the history of the Eighth Amendment. *See also Gregg v. Georgia*, 428 U.S. 153 (1976); and *Furman v. Georgia*, 408 U.S. 238 (1972), cited by *Ingraham* for the history.

[6] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (signed into law Dec. 19, 1989). Subsequently, the Commission amended Section 1.80 of the Rules to reflect Section 503(b) increases. *Amendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

K2 RADIO, LIMITED PARTNERSHIP
(Assignor)

and File No. BAPCT-900119KF

KULR CORPORATION
(Assignee)

For consent to the assignment of the
construction permit for unbuilt
station KRBQ(TV), Sheridan, Wyoming

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1993; Released: January 25, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned application for consent to the assignment of the construction permit for unbuilt station KRBQ(TV), channel 7, Sheridan, Wyoming, from K2 Radio, Limited Partnership (K2 Radio), to KULR Corporation (KULR). KULR is the licensee of station KULR(TV) (NBC), channel 8, Billings, Montana, the Grade B contour of which overlaps that of KRBQ(TV). KULR proposes to operate KRBQ(TV) as a 100% satellite of the Billings station pursuant to the satellite exception to the duopoly prohibition set forth in Note 5 to Section 73.3555 of the Commission's Rules. The application is unopposed.[1]

2. Under our satellite policy, *see Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petitions for partial stay and reconsideration pending), applicants for television satellite status are entitled to a presumption that the proposed satellite operation is in the public interest if the applicants meet the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Id.* at 4213-14. The Commission will view favorably applications that qualify for the presumption and are unrebutted by an opposing party. *Id.* at 4214. If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis and grant the application if there are other compelling circumstances that warrant approval. *Id.* For the reasons set forth below, we find that the proposed operation of KRBQ(TV) as a satellite station is consistent with our policy.

3. With respect to the first criterion needed to qualify for the presumption, the applicant's engineering study demonstrates that the City Grade contour of KULR(TV) and that predicted for the proposed Sheridan station will not overlap. Thus, the satellite proposal meets the first component of the presumption.

4. With respect to the second criterion, applicants can demonstrate that the area is underserved using one of two tests. The first is a "transmission test," in which the proposed satellite's community of license is considered underserved if two or fewer full-service stations are already licensed to it. *Id.* at 4215. Our records show that only one television station is currently licensed to Sheridan: station KSGW-TV, which operates as a satellite of station KOTA-TV, Rapid City, South Dakota.[2] In addition, an application for a construction permit for a new television station to operate as a satellite on channel 9, Sheridan, Wyoming, is pending. Assuming the new station becomes fully licensed, there will still be two or fewer full-service stations licensed to Sheridan. Accordingly, the applicant's proposal meets the "transmission test," demonstrating that the proposed satellite station will provide service to an underserved area.

5. Finally, to qualify for the presumption, applicants must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. Applicants for a new station seeking satellite authorization should submit an economic showing, such as a history of television station failures in the market or other information, indicating that a full-service station is not likely to survive in that market. In that regard KULR notes that, in awarding the construction permit to K2 Radio, the administrative law judge (ALJ) contemplated that the station would be operated as a satellite. *Rocky Mountain Communications Network, Inc.*, FCC 87M-759 (released April 7, 1987), ¶ 9. Therefore, the applicant contends, it need not submit a showing of a search for other buyers. Nevertheless, KULR additionally states that the circumstances which warranted satellite operation in 1987 have not changed. The applicant asserts that: the level of television service offered to Sheridan residents has not changed since 1987, and the only proposed change is an application to construct another satellite facility on channel 9. Citing the 1987 and 1992 *Television and Cable Factbooks*, KULR further asserts that the total number of households in Sheridan County, Wyoming, has declined from 11,000 in 1986 to 10,200 at the beginning of 1991, a decline of more than 7%. In addition, KULR reports that three of the other six counties within KRBQ(TV)'s predicted Grade B contour[3] showed a decline in total households between 1986 and 1991, while two[4] underwent no change and one[5] experienced growth of less than 1%. Moreover, KULR estimates that the operating costs for a full-service station in the market would be at

---

[1] We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempted from the 12-station limit set out in the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the application now before us will not implicate the 12-station rule.

[2] Sheridan is located in the Rapid City Area of Dominant Influence (ADI), which Arbitron ranks as the 163rd largest market.

[3] Big Horn County, Montana; Big Horn County, Wyoming; and Rosebud County, Montana.

[4] Powder River County, Montana, and Johnson County, Wyoming.

[5] Campbell County, Wyoming.

least $800,000 annually, while revenues from the market could not be expected to reach $400,000 annually, resulting in an annual net loss of $400,000.

6. We note that, in addition to the above showings, the history of this proceeding strongly suggests that Sheridan cannot support a full-service station. Both of the applicants for the original construction permit planned to operate the station as a satellite of a Casper, Wyoming, parent station. However, before the permit could be awarded, each party assigned its Casper station to another entity. As a result, neither party wished to construct the Sheridan station. The ALJ found that the public interest would nevertheless be served by awarding the permit to K2 Radio, pursuant to a settlement agreement by which the permittee agreed to submit an application, accompanied by a request for a satellite waiver, to assign the permit to the parent company of KULR. The Mass Media Bureau generally supported the settlement agreement, expressing its desire to resolve the proceeding quickly and institute as soon as possible a second local television service to Sheridan. *Rocky Mountain Communications Network* at ¶¶ 6, 9-12.

7. We believe that, under the standard by which a construction permit for a new television station is awarded, the applicants demonstrated the need for satellite status. The assignment of the permit in this highly unusual situation carries out the intention of the parties, the ALJ, and the Bureau, as contemplated in the settlement agreement. The applicant clearly has satisfied the first two criteria of the presumption. While KULR has not presented some of the specific evidence enumerated in the *Satellite Report and Order* to support the third criterion, given the totality of the circumstances, we believe that KULR has made a compelling showing.

8. Accordingly, based upon our determination that the applicant is qualified in all respects, IT IS ORDERED that the application to assign the construction permit for unbuilt television station KRBQ(TV), Sheridan, Wyoming, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-267

In the Matter of

Montana Public Safety Plan

ORDER

Adopted: January 12, 1993 **Released: January 25, 1993**

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On June 22, 1992, Region 25 (Montana) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Montana.

2. The Montana Plan was placed on Public Notice for comments on November 9, 1992, 57 FR 54234 (November 17, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Montana and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Montana.

4. Therefore, we accept the Montana Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Montana may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-269

In the Matter of

Oregon Public Safety Plan

ORDER

Adopted: January 12, 1993; Released: January 25, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On June 12, 1992, Region 35 (Oregon) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Oregon.

2. The Oregon Plan was placed on Public Notice for comments on November 9, 1992, 57 FR 54234 (November 17, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Oregon and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Oregon.

4. Therefore, we accept the Oregon Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Oregon may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Montachusett Broadcasting, Inc.
Licensee of Radio Station WXLO(FM)
Fitchburg, MA

Application for Review of
a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1993; Released: January 25, 1993

By the Commission:

1. The Commission has under consideration an Application for Review, dated June 29, 1992, of a *Memorandum Opinion and Order*, 7 FCC Rcd 3594 (MMB 1992), issued to Montachusett Broadcasting, Inc., (Montachusett) licensee of Radio Station WXLO(FM), for violating Section 73.1206 of the Commission's Rules. The *Memorandum Opinion and Order* ordered a forfeiture but reduced the amount from $5,000 to $4,000 because of WXLO's history of overall compliance with the Commission's Rules.

2. Section 73.1206 prohibits the recording for broadcast or broadcast of telephone conversations without the other party first having been informed of the intended broadcast use of the conversation. Montachusett admits that its employee called and recorded a conversation with the complainant without first informing him of the intent to broadcast it. Montachusett subsequently broadcast a recording of the conversation with the complainant.

3. In Montachusett's Application for Review, it admits that it violated Section 73.1206, but requests that the $4,000 forfeiture be reduced to $2,000. First, it argues that the Commission relied on the *Policy Standards, Statement for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), ("*Policy Statement*") (effective on August 8, 1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), which was not in effect at the time of the violation. Second, it argues that it did not receive notice of the new enforcement policy that resulted in its receiving a higher forfeiture amount than other licensees who had committed similar violations. *See Memorandum Opinion and Order for $2,000 to EZ Communications, Inc., (KYKY(FM))*, 7 FCC Rcd 1893 (MMB 1992) (*KYKY)* (issuing a $2,000 forfeiture for a January 1990, Section 73.1206 violation); *Letter to WRGB(TV), Inc.*, 5 FCC Rcd 6331 (MMB 1990) (Admonition for a Section 73.1206 violation).

4. After reviewing the record, we agree with the Bureau's decision as stated in the *Memorandum Opinion and Order*. Although Montachusett argues that we retroactively applied the Policy Statement, we did not rely on the Policy Statement for our authority to issue the higher forfeiture amount. Instead, we relied on a December 1989 Congressional grant of authority to raise forfeiture amounts for violations of Commission rules.[1] With this grant of authority, the Commission could have assessed a $25,000 forfeiture against Montachusett for a single violation, but the Bureau elected not to impose the higher forfeiture.[2] The reference to the Policy Statement in the *Memorandum Opinion and Order* was merely for guidance in determining the amount to assess.[3] The Commission was not legally required to issue a Policy Statement prior to assessing increased forfeiture amounts and was entitled to apply its current policies to cases initiated after development of those policies. Consequently, we reject licensee's argument.

5. Second, we reject Montachusett's argument that it did not receive notice of the new enforcement policy of issuing higher forfeiture amounts, prior to the June 3, 1991, subject violation. Notice was given in December 1989 - when Congress granted authority to issue higher forfeitures to the Commission. Although not necessary, notice was also given in February 1990, when the Commission called this newly acquired authority to the attention of its licensees in a news release.[4] Lastly, in May 1991, we issued a forfeiture for more than $2,000 ($25,000) for a single violation that occurred during this time, which should have alerted Montachusett that higher forfeitures were being assessed. *See Emmis Broadcasting* (KSHE), 6 FCC Rcd 2289 (1991).

6. Finally, we reject Montachusett's argument that *KYKY (FM)*, 7 FCC Rcd 1893 (MMB 1992) and *WRGB(TV), Inc.*, 5 FCC Rcd 6331 (MMB 1990), involve similar violations to Montachusett's, and, therefore, Montachusett should receive similar sanctions. In *KYKY(FM)*, the unauthorized broadcast of a telephone call occurred on January 30, 1990. Thus, the misconduct occurred after December 1989, when the Commission had Congressional authority to issue a higher forfeiture, but before the issuance of the February 16, 1990, news release informing licensees of the new law. While we had legal authority to issue a higher forfeiture to the licensee of KYKY(FM) prior to the issuance of the news release we opted to impose a $2,000 forfeiture and phase in the new forfeiture amounts under the new law after the issuance of the news release. In *Letter to WRGB(TV), Inc.*, 5 FCC Rcd 6331 (MMB 1990), the violation occurred in March 9, 1989, which preceded Congressional authorization to increase the fines. Consequently, the misconduct occurred under the old law.

7. ACCORDINGLY, IT IS ORDERED, that Montachusett Broadcasting, Inc.'s, Application for Review IS DENIED and that it, as the licensee of WXLO(FM), Fitchburg, Massachusetts, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of $4,000 for violating Section 73.1206 of the Commission's Rules.

---

[1] *See* TCI Cablevision of Colorado, 7 FCC Rcd 6015 (1992); TCI Cablevision of Maryland, Inc., 7 FCC Rcd 6013 (1992).

[2] It would be ironic, indeed, to conclude that although the Commission had the clear legal authority to have assessed a $25,000 forfeiture in this case, it lacked the authority to assess one of $5,000.

[3] The Policy Statement, issued August 1, 1991, merely provided guidance as to the forfeiture amounts to be assessed for specific violations.

[4] *See Amendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990); *News Release - FCC Forfeiture Authority Increased*, February 16, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 333, Arkansas-10 Garland — File No. 10564-CL-P-333-A-89

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1992; Released: January 25, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application for Review filed on September 20, 1991, by Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust (Chickasaw/CTC Trust) of the action of the Common Carrier Bureau's (Bureau) decision to affirm the dismissal of the captioned application by the Bureau's Mobile Services Division (MSD). *Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust*, 6 FCC Rcd 4990 (Com. Car. Bur. (1991) (*Chickasaw Telephone*). Thomas Domencich and the Committee for A Fair Lottery (Committee) filed an Opposition. Chickasaw/CTC Trust filed a Reply. For the reasons set forth below, we deny Chickasaw/CTC Trust's Application for Review.[1]

II. BACKGROUND

2. The FCC Form 401 for the captioned application, filed on October 19, 1988, lists the applicant as "Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust." In Item 10 of the Form 401, the box for "corporation" is checked. Item 11 identifies the applicant as organized under the state laws of Oklahoma. J.B. Bright (Bright) signed the application and designated his title as "President." Bright, the President of Chickasaw Telephone Company (Chickasaw), also signed the certification on the transmittal sheet. The ownership exhibit in the application states that the telephone company had established the CTC Scholarship Trust (CTC Trust) to provide scholarships to its employees and other beneficiaries, and that the trustee was R. Phillip Baker, a certified public accountant. The exhibit further states that "[neither] the *applicant*, nor *its officers, directors or shareholders* nor the Trustee or Beneficiaries of [CTC Trust]" have interests of 1 percent or greater in other applications for the Arkansas-10 Rural Service Area (RSA). (Emphasis added).

3. Subsequent to the lottery selecting the captioned application, on December 1, 1989, an amendment was filed, signed by Bright and a new trustee for CTC Trust. The amendment included an amended application FCC Form 401, designating the applicant as "CTC Scholarship Trust" and was signed by John D. Evans, President of Arbuckle Scholarship Management, Inc., the new trustee. Item 10 of the amended application identified the applicant ownership as a "Trust." The amendment stated that the initial application listed "Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust" as the applicant in order to disclose that the telephone company had established CTC Trust and had obtained the firm financial commitment from a bank for the benefit of the Trust. The amendment added that CTC Trust had always been the real party in interest and was orally created by Royce E. Gauntt, the controlling shareholder and Chairman of the Board of Directors of the telephone company. The amendment also included the trust instrument of November 3, 1989.

4. The MSD dismissed the captioned application as defective because the signature of the President of Chickasaw indicated that Chickasaw was the applicant, not the CTC Trust. The MSD therefore found that Chickasaw, as a provider of landline service in another RSA, was ineligible pursuant to Section 22.902(b) of the Commission's Rules to file a cellular application for Frequency Block A. The MSD also determined that, if CTC Trust was the applicant, the application was improperly signed in violation of Sections 1.743(a), 22.6(d), and 22.923(b)(7) of the rules.[2]

5. In affirming the MSD, the Bureau determined that it was not necessary to decide whether Chickasaw or CTC Trust was the real applicant, because under either factual determination, the application was defective. *Chickasaw Telephone*, 6 FCC Rcd at 4990. The Bureau found that on the assumption that Chickasaw was the applicant, it was ineligible to apply for a nonwireline frequency block. *Id.* at 4991. The Bureau also found that the December 1991 amendment was unacceptable, because applications unacceptable for filing may not be amended after the filing date in order to comply with the Commission's Rules. *See Chickasaw Telephone*, 6 FCC Rcd at 4992 n.17. The Bureau stated that if CTC Trust was the applicant, the application was improperly executed and therefore defective under the Commission's Rules because it was signed and certified by the president of the corporate settlor rather than the trustee. *Id.* at 4991. In addition, the Bureau found that CTC

[1] Chickasaw/CTC Trust also filed on September 20, 1991, a Conditional Petition for Partial Reconsideration of the Bureau's determination regarding its financial commitment on the ground that the MSD had not previously addressed that issue. The Petition is rendered moot by our decision herein.

[2] *See* Letter from Chief, Mobile Services Division, Common Carrier Bureau, No. 63500-DS (Mar. 16, 1990). Section 1.743 provides in pertinent part, that "applications . . . shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer or duly authorized employee, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association." *See* 47 C.F.R. § 1.743(a). Section 22.6(d) provides that applications shall be signed as prescribed by Section 1.743(a). *See* 47 C.F.R. § 22.6(d). Section 22.923(b)(7) requires that an applicant for an RSA must make a certification on the Transmittal Sheet submitted with the microfiche copies of its application. The certification must be signed by an authorized representative of the applicant. *See* 47 C.F.R. § 22.923(b)(7).

Trust as an applicant was not financially qualified because the firm financial commitment of the bank was to Chickasaw and not to CTC Trust.

III. DISCUSSION

6. Chickasaw/CTC Trust argues in its Application for Review that the Bureau erred because Chickasaw is neither the applicant nor a real party in interest. In order to determine otherwise, it contends, the Commission must conclude that Chickasaw has an ownership interest in CTC Trust or that Chickasaw controls the Trust. *Cf. Advanced Mobile Phone Service, Inc. (Los Angeles Wireline Order)*, 53 R.R. 2d (P&F) 1127, 1134 (1983). The trust instrument, it asserts, clearly shows that CTC Trust is the real party in interest in the application and that the corporate settlor retains no incidence of ownership in or control over the Trust. The Bureau was wrong, it argues, in its assertion that "information . . . throughout the application as filed indicates that Chickasaw is the applicant." *Chickasaw Telephone*, 6 FCC Rcd at 4991, 4992 n.7. Chickasaw/CTC Trust claims that the application was filed as it was in order to disclose the role of Chickasaw in the formation of CTC Trust. This, it says, accounts for the name of the application, "Chickasaw Telephone Company for the Benefit of CTC Trust," the initial identification of the applicant as a corporation, and the bank letter stating that the settlor would forward the funds committed by the bank to the Trust. Further, contends Chickasaw/CTC Trust, although Chickasaw is not a real party in interest, thereby rendering moot the issue of whether the telephone company would be eligible to apply for frequency Block A, Section 22.902(b) does not incorporate the prohibition that the Commission may have intended against wirelines filing for nonwireline frequencies outside of areas where they do not provide wireline telephone service. *Cellular Communications Systems*, 89 FCC 2d 58, 77 (1982).

7. We find Chickasaw/CTC Trust's explanation unconvincing. Chickasaw/CTC Trust's explanation that it included its name for the purpose of full disclosure does not counter the essential fact that the application was filed by Chickasaw. If the applicant was CTC Trust, as Chickasaw/CTC Trust asserts, the FCC Form 401 should not have shown that the applicant was a corporation, or referred to the laws of Oklahoma as the state law under which the applicant was organized, because CTC Trust was allegedly established by its corporate settlor pursuant to Texas law. *See supra* para. 2. In addition, neither should the signature on FCC Form 401 have been that of Chickasaw's President, nor should Exhibit 1 have identified the applicant as having shareholders and referred to Chickasaw as the real party in interest. *Id.* [3] The arguments offered by Chickasaw/CTC Trust are not new and were correctly resolved below.

8. Further, an assumption of the CTC Trust as the applicant is belied by the facts of this case showing that the application was not filed independently of the telephone company. *See supra*, para. 7. The filing by the telephone company and signing of the application by its president pierced the alleged separation between the company, *i.e.* its controlling shareholder and board chairman, and the Trust. Chickasaw/CTC Trust apparently recognized this problem by attempting to rectify the application by an amendment that, in effect, requests the substitution of the Trust as the applicant *ab initio*.[4] Such an amendment is prohibited. Being unacceptable for filing, an application may not be amended after the filing date or after the lottery to bring it into compliance with the Commission's Rules. *See* Section 22.918(b); *REM Communication*, 3 FCC Rcd 3705 (1988).

9. Furthermore, we reject Chickasaw/CTC Trust's contentions with regard to wireline eligibility for a nonwireline frequency. Section 22.902(b) provides that frequencies in frequency Block A, for which the subject application was filed, are available only "for carriers not also engaged in the business of affording public landline message telephone service . . . ." 47 C.F.R. § 22.902(b). The Commission has clearly set forth the intent, objectives, and impact of this rule. The Commission specifically considered the eligibility of wireline companies to apply for nonwireline frequencies in areas where they do not provide local exchange service and rejected it, stating that such eligibility would "offend fundamental notions of equity and fairness . . .." because wirelines ". . . would have exclusive access to one frequency block in certain areas and would still be able to compete with non-wireline carriers . . . in all other areas." *Cellular Communications Systems*, 89 FCC 2d at 77, *further recon.* 90 FCC 2d 571, 578 & n.10 (1982). Moreover, stated the Commission, a policy favoring that eligibility would "run counter" to the competitive objectives of the traditional separate allocation between wireline and nonwireline carriers. *Id., citing General Mobile Radio*, 13 FCC 1190, 1218 (1949). Subsequently, RSA applicants were on notice that the Commission would retain for initial RSA systems the separate allocation of frequencies for wirelines and nonwirelines. *See Rules for Rural Cellular Service, (Order on Reconsideration)*, 2 FCC Rcd 3366, 3369 (1987). Therefore, we affirm the Bureau's conclusion that the application as filed by Chickasaw was not eligible for a nonwireline frequency. *See Chickasaw Telephone*, 6 FCC Rcd at 4991.

10. Consequently, in light of our decision that the Bureau correctly determined that Chickasaw was the applicant and that it was ineligible, we need not address arguments regarding whether, assuming CTC Trust was the applicant, the Bureau properly dismissed the application.[5] We note, however, that given the circumstances surround-

---

[3] The Bureau also found that the firm financial commitment specified Chickasaw as the applicant. *See Chickasaw Telephone*, 6 FCC Rcd at 4992 n.7; Application, Exhibit 11. That Chickasaw subsequently submitted an amendment attempting to correct these "errors" suggests it recognized the problems it had created for itself.

[4] We also find it pertinent to Chickasaw/CTC Trust's problem that at the time the application was filed, Mr. Baker, the initial Trustee, had a business relationship, which was later disclosed by the amendment, as a certified public accountant to the settlor. *See* December 1, 1989 Amendment; *cf.* Application, Exhibit 1. The amendment reported that he was replaced by a new trustee for the purpose of avoiding the "appearance of conflict of interest." *Id.* Persons or entities should not be permitted to create a separate entity to apply for a license in order to circumvent our filing rules, *e.g.*, in the instant case, an eligibility rule. Section 22.902(b). *See infra*, para. 9.

[5] Further, on December 10, 1992, we received supplementary pleadings to the Application for Review and the Conditional Petition for Partial Reconsideration from Chickasaw/CTC Trust, requesting that the dismissal of the application by the Bureau for lack of financial qualifications be set aside in view of the

ing the filing of the application, CTC Trust would itself appear to be ineligible as the representative of a wireline carrier.

IV. CONCLUSION

11. Based upon our thorough review of this proceeding, we affirm the Bureau's determination that amendment to the application indicating Chickasaw as the applicant is unacceptable and that the application was improperly filed due to Chickasaw's ineligibility. The application and the amendment to rectify it do not comply with the requirements set forth by the Commission, and the application was therefore defective when filed.

V. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, that the Application for Review filed by Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

recent decision, *Kent S. Foster*, FCC 92-531 (December 8, 1992). We need not reach that issue because we are deciding this case on other grounds.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Applications of Gulf Atlantic Media Corporation For Station WGUL(AM) and WGUL-FM, Inc. For Station WGUL-FM, New Port Richey, Florida

File Nos. BR-880927ZK and BRH-880927ZJ

MEMORANDUM OPINION AND ORDER AND NOTICE OF FORFEITURE

Adopted: December 30, 1992; Released: January 25, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Reconsideration from the licensee of WGUL(AM)/WGUL-FM[1] requesting elimination or reduction of the sanctions imposed against it in *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990) (*Miami*). In *Miami*, we concluded that the licensee's failure to comply with the Commission's EEO Rule warranted renewal for less than a full term, subject to reporting conditions, and a Notice of Apparent Liability in the amount of $15,000. *See* 47 C.F.R. Section 73.2080. The licensee requests renewal for a full term without reporting conditions and with elimination or reduction of the forfeiture.

II. BACKGROUND

2. Our decision in *Miami* describes the licensee's failure to engage in adequate EEO efforts. Review of the licensee's renewal application and inquiry response disclosed that it failed to implement a formal EEO program until the last five months of the license term. Specifically, the licensee used no minority, and few general, recruitment sources until the last five months of the term and received no minority referrals during the term. It also failed to interview or hire any minorities for its 14 openings during the term. Two months before the expiration of the license term, the licensee hired an Hispanic announcer part-time and promoted him to full-time. He was the only minority employed by the licensee during the term.

III. PLEADINGS

3. In support of its request for reconsideration, the licensee argues that the Commission incorrectly applied its own rules regarding alternative labor force requests. First, it maintains that the Commission failed to consider its formal request for use of an alternative labor force. Contrary to the Commission's ruling in *Miami*, the licensee argues that it formally requested permission to use the alternative labor force of Pasco County, Florida in its renewal application. The request was predicated on the licensee's statement that there is no public transportation and that it would take between one and two hours to drive the 35 miles between areas of significant minority populations in the MSA and the stations. The licensee argues that these factors provide a showing sufficient to warrant use of the Pasco County labor force data rather than MSA data.[2] The licensee contends that, if the Commission believed the information was insufficient, it was required to initiate further inquiry.

4. Next, the licensee maintains that the Commission improperly evaluated the alternative labor force request because it applied the criteria incorrectly. To justify use of an alternative labor force, the licensee argues that it needs to make any one, but not all, of the three showings outlined in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967, 3973 (1987) (hereinafter *Broadcast EEO*). Contending that it met two of the criteria, distance and commuting difficulties, it argues that the three criteria for supporting use of an alternative labor force constitute separate tests and not a cumulative three-pronged test.[3] Acknowledging that a case decided subsequent to *Broadcast EEO* stated that the alternative labor force test included "the distance of the station from areas with significant minority population in the MSA, commuting difficulties and the lack of success of previous recruitment efforts,[4] the licensee maintains that the Commission did not mean to make the test cumulative. The licensee states that it is "inconceivable" that the Commission would change the test so significantly by referring to the last of the three points with an "and" in *Manassas* instead of "or" as shown in *Broadcast EEO, supra*.

5. Even if the Commission properly rejected its request for use of an alternative labor force, the licensee argues that the Commission failed to consider its showing as mitigative of a sanction. It states that the Commission ruled previously that it would consider an insufficient alternative labor force request as mitigative of deficient EEO efforts because of the distance (30 miles) between the station and concentrations of minorities in its labor force. *See MEDIACOM, Inc.*, FCC 84-70, 55 RR 2d 1291 (1984).

6. Lastly, the licensee argues that the Commission improperly compared and found its EEO record similar to that of KYFC(TV), Kansas City, Missouri. *See Application of Kansas City Youth for Christ, Inc. for Renewal of License of Station KYFC(TV), Kansas City, MO*, 3 FCC Rcd 6866

---

[1] Gulf Atlantic Media Corporation and WGUL-FM, Inc. are co-owned and are considered as one licensee.

[2] The labor force of the Tampa/St. Petersburg/Clearwater, Florida MSA is 15.2% minority (8.8% Black, 5.6% Hispanic, 0.5% Asian and 0.3% American Indian). The Pasco County, Florida labor force is 6.5% minority (2.6% Black, 3.2% Hispanic, 0.3% Asian and 0.4% American Indian).

[3] *Broadcast EEO* states that an alternative labor force may be allowed if (1) a licensee can show that the distance is great between a station and areas of minority population in the MSA, (2) that commuting from those areas to the station is difficult or (3) recruitment efforts directed at the MSA minority labor force have been fruitless. *Broadcast EEO*, 2 FCC Rcd at 3973.

[4] *See Application of National Capital Christian Broadcasting, Inc. For Renewal of License of Station WTKK(TV), Manassas, Virginia*, 3 FCC Rcd 1919, 1922 n.9 (1988) (*Manassas*).

(1988) (*KYFC(TV)*). The licensee argues that, contrary to the Commission's ruling in *Miami*, its record is less egregious than that of Station KYFC(TV) and that their situations are very different. Noting that Kansas City is the center of a large and ethnically diverse metropolis, the licensee argues that its stations are in a small, rural, mostly white retirement community on the edge of an MSA. In *KYFC(TV)*, the station's license was renewed for less than a full term subject to reporting conditions and a $10,000 forfeiture for violations of the Commission's EEO Rule.

IV. DISCUSSION

7. The licensee's contention that the Commission failed to consider its alternative labor force request is without merit. *Miami* found that the licensee failed to provide sufficient information to satisfy the three-part test set out in *Broadcast EEO*. *Broadcast EEO* set out three criteria the Commission would consider in determining whether or not to grant a request for use of an alternative labor force. *See* n.3, *supra*. And, although the test as set out in *Broadcast EEO* indicated that the showing may not have required all three criteria, *Manassas*, the first case in which the Commission applied the criteria, clarified the requirements. Critical to the Commission's analysis in *Manassas* were the licensee's recruitment efforts directed at the minority labor force within the MSA. Because the licensee could not show efforts to attract minorities from the MSA, its request to use alternative labor force figures failed despite its showings on distance and commuting difficulty. In all cases subsequent to *Manassas* involving use of alternative labor force figures, the Commission has applied the *Manassas* test. *Application of Group Six Communications, Inc., Licensee of Station WWOC-FM, Avalon, New Jersey, for Renewal of License*, 7 FCC Rcd 1815, 1817 n.2 (1992); *Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340, 2344 n.10 (1991) (KVCR-TV, San Bernardino, California), 2345 n.17 (KESQ-TV, Palm Springs, California); *Application of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities*, 5 FCC Rcd 5683, 5688 n.9 (1990) (WAMR(AM)/WCTQ-FM, Venice, Florida).[5]

8. Furthermore, submission of a request for use of alternative labor force data by licensees is "strictly optional and at the licensee's discretion," and "the burden will be on the licensee to justify the use of such alternative data." *Broadcast EEO* at 3973. To satisfy the alternative labor force criterion concerning recruitment efforts, a licensee must show that, "despite extensive recruitment involving use of minority referral sources, it was unable to obtain qualified applicants from areas of minority concentration in the MSA..." *Manassas* at 1920. This licensee failed to make such a showing.

9. We further find without merit the licensee's argument that the Commission failed to consider its recruitment difficulties in mitigation of the sanctions imposed. As *Miami* indicates, we considered all information submitted by the licensee. It now seeks to mitigate its inadequate EEO record based upon the distance between the stations and areas in which minorities are concentrated. However, unless a licensee attempts to recruit minorities, we cannot conclude that minorities are less willing to work at a station than non-minorities due to the distance they must travel in getting to and from work. The problem of traveling a long distance to work may be faced by potential station employees without regard to race. Accordingly, we again conclude that mitigation is not warranted.

10. We also find the licensee's argument that its EEO violations are less egregious than those of Station KYFC(TV) to be without merit. While there are many similarities between KYFC(TV) and WGUL(AM)/WGUL-FM, we believe the situation of the latter to be worse. Both failed to implement an EEO program while employing similar-sized workforces in areas of similar-sized minority labor forces. Although KYFC(TV) may be closer to concentrations of minorities in its MSA than WGUL(AM)/WGUL-FM is in New Port Richey, the Commission has held that a distance of 30 miles from a minority population center is not sufficient to justify use of an alternative labor force without evidence of unsuccessful efforts to recruit minorities. *See Manassas* at 1919, 1920. Furthermore, KYFC(TV) obtained four minority applicants for its 19 full-time and nine part-time positions and hired two minorities for full-time upper-level positions. The station also retained three other minorities in upper-level positions in the first two years of its term. *See KYFC(TV)* at 6866. In contrast, WGUL(AM)/WGUL-FM obtained no minority applicants among its 35 applicants and hired no minorities among its 14 full-time hires. It also did not employ minorities in full-time positions during its term until the very end when it promoted an Hispanic part-time employee to full-time. Accordingly, the violations by the licensee of WGUL(AM)/WGUL-FM are more serious than those of KYFC(TV) and a higher forfeiture is appropriate.

V. CONCLUSION

11. After taking into account the licensee's arguments, we find that our original decision renewing WGUL(AM)/WGUL-FM's licenses for a short-term subject to reporting conditions and a Notice of Apparent Liability for forfeiture in the amount of $15,000 was appropriate. Accordingly, we deny the licensee's petition for reconsideration, renew its licenses for a short-term subject to reporting conditions and issue a Notice of Forfeiture in the amount of $15,000.

---

[5] In addition, cases prior to *Broadcast EEO* discussing alternative labor force figures also required submission of information concerning more than one criterion. *Applications of Certain Broadcast Stations Serving Communities in the States of Indiana, Kentucky and Tennessee*, 54 RR 2d 1473, 1484 (1983) (recruitment efforts, commuting difficulties and location of station compared to location of potential applicants); *License Renewal Applications of Certain Broadcast Stations Serving the Chicago Metropolitan Area*, 89 FCC 2d 1031, 1033 (1982) (size of station workforce and minority labor force statistics); *Application of Northwest Community Broadcasting, Inc. for Renewal of License of Station WWMM(FM), Arlington Heights, Illinois*, 85 FCC 2d 1012, 1014 (1981) (location of community of license within MSA, availability of public transportation and commuting difficulties).

VI. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Gulf Atlantic Media Corporation and WGUL-FM, Inc. IS DENIED,[6] and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Gulf Atlantic Media Corporation and WGUL-FM, Inc. FORFEIT to the United States the sum of fifteen thousand dollars ($15,000) for the wilful and repeated violation of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order and Notice of Forfeiture.

13. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Forfeiture to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[6] The reporting conditions imposed on the licensee in *Miami* still stand. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the licensee have any questions regarding the reports, it may telephone the Mass Media Bureau's EEO Branch at 202-632-7069.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-268

In the Matter of

Nevada Public Safety Plan

ORDER

Adopted: January 12, 1993; Released: January 25, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On April 19, 1990, Region 27 (Nevada) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Nevada. On May 31, 1990, the Commission sent a letter to the region pointing out certain deficiencies in the Plan. Revisions to the Plan were filed on May 15, 1992.

2. The Nevada Plan was placed on Public Notice for comments on November 9, 1992, 57 FR 54234 (November 17, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Nevada and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Nevada.

4. Therefore, we accept the Nevada Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Nevada may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 15, 1993

EXPANDED INTERCONNECTION FILING DATES ESTABLISHED FOR RESPONSES TO MOTIONS OF OKLAHOMA CORPORATION COMMISSION AND NARUC TO MODIFY FEBRUARY 16, 1993 DEADLINE FOR FILING PHYSICAL COLLOCATION TARIFFS

CC Docket No. 91-141

On October 19, 1992, the Federal Communications Commission (Commission) released a Report and Order and Notice of Proposed Rulemaking in *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (FCC 92-440), 7 FCC Rcd 7369 (1992) (Order). On January 12, 1993, the Oklahoma Corporation Commission (OCC) filed a motion requesting that the Commission grant a waiver to Tier 1 local exchange carriers (LECs) operating in Oklahoma from the requirement to file physical collocation tariffs by February 16, 1993 to provide the OCC additional time to complete a collocation rulemaking. On January 13, 1993, the National Association of Regulatory Utility Commissioners (NARUC) also filed a motion to modify the February 16, 1993 deadline for filing interstate physical collocation tariffs. NARUC requests that the Commission either modify or suspend the deadline or grant LECs waivers so that states have additional time to make final determinations regarding collocation. NARUC states that, at a minimum, the Commission should extend the deadline to March 1994.

Comments on these motions must be filed by Monday, January 25, 1993, and replies by Monday, February 1, 1993 with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Parties also should send copies of comments and replies to Linda L. Haller, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554 and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Washington, D.C. 20036. Copies of the motions can be obtained from Downtown Copy Center at 202-452-1422.

This remains a non-restricted rulemaking proceeding for purposes of the Commission's *ex parte* rules. *Ex parte* presentations are permitted, except during any Sunshine Agenda period, provided they are disclosed as described in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206. For further information, contact Linda L. Haller (202-632-1298), Policy and Program Planning Division, Common Carrier Bureau.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-83

In re Applications of

RICHARD M. CARRUS	File No. BPH-891018MD
HORTON BROADCASTING COMPANY, INC.	File No. BPH-891018MI
EVETT COMMUNICATIONS, INC.	File No. BPH-891018MN
FRANK J. BANKS d/b/a BANKS INVESTMENT COMPANY	File No. BPH-891018MQ

For Construction Permit for a
New FM Station on Channel 267A
in Port St. Lucie, Florida

Appearances

Dennis P. Corbett, Thomas J. Hutton, and *Lynn M. Crakes,* on behalf of Richard M. Carrus; *Irving Gastfreund,* on behalf of Horton Broadcasting Company, Inc.; *Vincent A. Pepper, Neal J. Friedman* and *Louise Cybulski,* on behalf of Evett Communications, Inc.; *Katrina Renouf* and *Margot Polivy,* on behalf of Frank J. Banks d/b/a Banks Investment Company, and *Robert Zauner,* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: January 15, 1993; Released: February 1, 1993

PRELIMINARY STATEMENT

1. This case involves the mutually exclusive applications for a new FM broadcast station in Port St. Lucie, Florida, filed by Richard M. Carrus (Carrus), Horton Broadcasting Company, Inc. (HBC), Evett Communications, Inc. (ECI), and Frank J. Banks d/b/a Banks Investment Company (Banks). The proceeding was designated for evidentiary hearing by Order of the Chief, Audio Services Division, 6 FCC Rcd 2063 (1991) (HDO).[1]

2. The HDO specified three issues for hearing with respect to the four applicants who continue to prosecute their applications:

> To determine whether there is a reasonable possibility that the tower height and location proposed by Carrus would constitute a hazard to air navigation.
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the specific issues, which of the applications should be granted, if any.

3. By *Order,* FCC 91M-3093, released October 17, 1991, the Presiding Judge resolved the air hazard issue designated against Carrus in Carrus' favor. Therefore, only the latter two issues remain.

4. A prehearing conference was convened on June 18, 1991. An admission session was held on October 15, 1991. At the admission session, the parties submitted and the Presiding Judge admitted into evidence a Joint Engineering Stipulation providing that the area served by each applicant is well served by more than five FM services; that, consequently, there is no comparative advantage to any applicant in this regard; and that there is no material difference between any applicant in the number of overall persons or amount of area served. Accordingly, in the Joint Stipulation, each applicant disclaimed any comparative advantage in the areas and populations covered, and in the number of services available within its proposed 1 mV/m contour.

5. Hearing sessions were originally scheduled to convene on October 21, 1991. By *Order,* FCC 91M-3119, released October 21, 1991 the Presiding Judge continued the hearing to October 22, 1991, in light of ongoing settlement negotiations. On October 22, 1991, ECI and HBC announced that they had agreed to merge and buy out the remaining applicants. Tr. 245-250. Accordingly, by *Order,* FCC 91M-3147, released October 24, 1991, the Presiding Judge suspended the hearing date and gave the applicants until November 21, 1991, to file a joint petition for approval of settlement agreement. However, HBC and ECI failed to consummate their announced merger, and the hearing was rescheduled. *See Order,* FCC 91M-3345, released November 27, 1991. Hearing sessions were held on December 9, 10, 11, 12, 13 and 19, 1991. The record was closed at the conclusion of the hearing on December 19, 1991. *See Order,* FCC 91M-3501, released December 23, 1991. Findings of fact and conclusions of law were filed February 7, 1991; replies were filed February 21, 1992.

---

[1] Fourteen other applications originally designated for hearing have since been dismissed by the Presiding Judge. *See Order,* FCC 91M-1600, released May 9, 1991 (St. Lucie Broadcasting, Inc.); *Order,* FCC 91M-1630, released May 14, 1991 (Surfside Broadcasting, a General Partnership); *Order,* FCC 91M-1672, released May 20, 1991 (Port St. Lucie Broadcasting Limited Partnership, Port St. Lucie Communications, Inc., Blue Rainbow Broadcast System, Inc., St. Lucie Progressive Media, Inc., Premier Network Broadcast Limited Partnership, Sue K. Schmidt, Dean Communications, Inc. and Douglas Johnson); *Order,* FCC 91M-2675, released August 29, 1991 (Cityron Corporation); *Order,* FCC 91M-2982, released October 2, 1991 (Salsa Radio Limited); *Order,* FCC 91M-2983, released October 2, 1991 (St. Lucie Radio Corporation); *Order,* FCC 91M-3479, released December 19, 1991 (Port St. Lucie Broadcasting Corporation).

6. By *Memorandum Opinion and Order*, FCC 92M-141, released January 31, 1992, the Administrative Law Judge granted a Motion to Enlarge Issues Against Frank J. Banks d/b/a Banks Investment Company, filed by Richard J. Carrus. The added issues sought to determine:

> 1. Whether Banks Investment Company is financially qualified to be a Commission licensee; and
>
> 2. Whether Banks Investment Company falsely certified its financial qualifications in its application for a new FM station at Port St. Lucie, Florida, and, if so, the effect thereof on its qualifications to be a Commission licensee.

Discovery on the added issues was completed on March 13, 1992 and the hearing was held on April 7, 1992. The record was closed on the latter date. Findings of fact and conclusions on the added issues were filed May 18, 1992; replies were filed June 1, 1992.

Findings of Fact

Comparative Issue

Richard M. Carrus (Carrus)

Background

7. Richard M. Carrus is an individual applicant who currently resides in Jericho, New York. (Carrus Ex. 1, p. 1). Carrus is employed as the general manager of a motor inn located at LaGuardia Airport, where he has been employed for 14 years. (Tr. 699). In addition to his employment, Carrus has a 10% ownership interest in the motel, given to him by his uncle and his father, Gerald. Tr. 700-701. Four Carrus family members own all but 8% of the motel. Tr. 700.

8. At the time Carrus filed his application for Port St. Lucie he had pending an application for Jupiter, Florida. Tr. 702; Carrus Ex. 1, p. 1. He had been made aware of the availability of the Jupiter facility by his father, a 41.19% stockholder and Co-Chairman of the Board of Directors of Infinity Broadcasting Company. Tr. 705; Carrus Amendment dated May 23, 1991, granted, FCC 91M-1977, released June 21, 1991. Prior to filing the Jupiter application, Carrus had made a personal decision to change careers and relocate. Tr. 699-700, 703. In this connection, the hotel of which he is part owner and manager has been on the market to be sold. Tr. 703. Carrus had informed his father of his career change plans and his father told him about Jupiter. (*Id.*). Gerald Carrus suggested to his son that he call Leventhal, Senter & Lerman, Infinity's communications counsel, if he were interested in applying for the Jupiter station and communications counsel in turn advised him of the Port St. Lucie availability. Tr. 706. Counsel also suggested the broadcast engineer used by Carrus. Tr. 708. The initially proposed transmitter site was selected by a site location company and the amended site by counsel. Tr. 708-709.

9. In the course of preparing a construction and three-months operating budget with the assistance of counsel, Carrus personally obtained equipment cost estimates. Tr. 713. Also, Carrus personally secured his loan letter from Citibank. Tr. 710. Carrus spoke to Katry Britton, a bank representative. Tr. 710-711. Carrus has known Britton in connection with his hotel business since 1986. Carrus applied in 1986 for a mortgage for the motor inn. Although his attempt to obtain the mortgage was unsuccessful, Carrus has had discussions with him over the past five years. Tr. 714. Britton only required Carrus father's personal guarantee for the loan. Tr. 710-711.

Diversification

10. Carrus has no other interest in any medium of mass communication. Carrus Ex. 1, p. 2.

Integration

11. In the event of a grant of his application Carrus will work part-time (25 hours per week on a day-to-day basis) as the station's General Manager. *Id.* In this capacity, he will have oversight and supervisory responsibility for all aspects of the station's operation, including but not limited to programming, sales and personnel. *Id.* He will resign all current employment and eliminate time spent on current business interests in order to fulfill his commitment to the station. *Id.*

12. On the date direct exhibits were exchanged in this proceeding, Carrus also had pending an application for a new FM station at Jupiter, Florida (File No. BPH-890914OE). *Id.*[2] In the event of a grant of his Jupiter application, Carrus planned to spend an additional 40 hours per week working as General Manager of that station. In a typical week (in the event of a grant of both the Port St. Lucie and Jupiter applications), he proposed to spend 4 hours a day, Monday through Friday, and 5 hours on Saturday, working on Port St. Lucie station business, and 8 hours a day Monday through Friday working on Jupiter station business. *Id.* The block of time spent each day during the week at the Port St. Lucie station would vary (morning, afternoon, evening) depending on the two stations's needs. *Id.* at 1-2. In the event of a grant of both applications, he would reside in Jupiter, Florida. *Id.* at 2. He then proposed to fulfill his 25-hour weekly commitment to the Port St. Lucie station by commuting by automobile to and from Port St. Lucie six times a week. Port St. Lucie is located approximately 30 miles from Jupiter. Carrus projects that the roundtrip commute between those locations would take approximately one and a half hours. *Id.*

13. Carrus is accustomed to working long hours. Since 1980, he has often worked 60-70 hours a week in hotel management, including evening and weekend work. His current schedule as General Manager of the Westway Motor Inn at LaGuardia Airport in New York calls for his working 50-60 hours a week, and he is prepared to increase that workload. *Id.*, Tr. 699. In addition, his current roundtrip commute to work is approximately one hour, 45 minutes. Carrus Ex. 1 at 2.

---

[2] That application was subsequently dismissed at Carrus' request. *See Order*, FCC 91M-3038, released October 7, 1991.

Auxiliary Power

14. If his application is granted, Carrus will install emergency power generators at the studio and at the transmitter site of his Port St. Lucie FM station to ensure that the station will be able to remain on the air in the event of a public utility failure. Carrus Ex. 1 at 2-3.

Horton Broadcasting Company, Inc. (HBC)

Corporate Structure

15. HBC is a corporation organized under the laws of the State of Florida. The corporation has two classes of stock: Voting Common Stock and Non-Voting Common Stock. HBC Ex. 1, p. 1. Helen B. Horton, who resides at 2866 S.E. Ginza Street, Port St. Lucie, Florida 34952, is the President, Treasurer, Secretary and the sole Director of HBC. Horton owns 2,000 shares of Voting Common Stock in HBC, which represents 100 percent of the Voting Common Stock of the corporation and 20 percent of the total equity of the corporation. HBC Ex. 1, p. 1.

16. Vernon D. Smith, who resides at 3150 North A1A, Apartment 501N, Ft. Pierce, Florida 34949, owns 8,000 shares of the Non-Voting Common Stock in HBC, representing 100 percent of the Non-Voting Common Stock in the corporation; Smith's 8,000 shares of Non-Voting Common Stock in HBC represent 80 percent of the total equity in the corporation. (*Id.*). Smith is neither an officer nor a director of HBC, and he has no voting power in the corporation. (*Id.*).

17. Article IV of HBC's Articles of Incorporation expressly provides that, except as required by applicable law, the owners of Non-Voting Common Stock in HBC are precluded from voting on any matter to come before the shareholders of the corporation for a vote or consent. HBC Ex. 1, p. 9. Moreover, Article IV of HBC's Articles of Incorporation expressly sets forth the following restrictions on the activities of non-voting shareholders in HBC:

> "No owner of Non-Voting Common Stock of the Corporation shall be materially involved, directly or indirectly, in the management or operation of any of the media-related activities of the Corporation. Without limiting the generality of the foregoing:
>
> "a. No owner of Non-Voting Common Stock of the Corporation shall act as an employee of the Corporation if his or her functions, directly or indirectly, relate to the media enterprises of the Corporation;
>
> "b. No owner of Non-Voting Common Stock of the Corporation shall serve in any material capacity as an independent contractor or agent with respect to the Corporation's media enterprises;
>
> "c. No owner of Non-Voting Common Stock of the Corporation shall initiate communications with the officer(s) or Board of Directors of the Corporation on matters pertaining to the day-to-day operations or the Corporation's media enterprises;
>
> "d. No owner of Non-Voting Common Stock of the Corporation shall vote on the removal of a Director of the Corporation except where such Director is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause, as determined by an independent party;
>
> "e. No owner of Non-Voting Common Stock of the Corporation shall be actively involved in the management or operation of any of the media businesses of the Corporation."

HBC Ex. 1, pp. 9-11.

18. Under Section 1 of Article VIII of HBC's By-Laws, no voting shareholder in HBC may acquire or hold any non-voting stock in the corporation. HBC Ex. 10, p. 29. Under Section 1 of Article VIII of HBC's By-Laws, no non-voting shareholder in HBC may at any time act or serve as an officer or director of HBC or as an employee, independent contractor or agent of HBC. (*Id.*). Furthermore, Section 2 of Article VIII of HBC's By-Laws expressly provides that no non-voting shareholder in HBC may be: (a) materially involved at any time in the business or affairs of the corporation; (b) entitled to receive notice of any shareholders' meeting or of any actions to be taken at any such meeting; or (c) entitled to vote on any matter. (*Id.*). Under Section 3 of Article VIII of HBC's By-Laws, no non-voting shareholder in HBC may at any time acquire or hold any Voting Common Stock in HBC. (*Id.*).

HBC's Formation and Application

19. Horton first learned of the availability of the Port St. Lucie, Florida frequency from Larry Lee. Tr. 490. Lee and Horton are business acquaintances. Lee runs an insurance business, and, since Horton is a real estate broker, he and she "network" with one another and make business referrals to one another. Tr. 503-504. Horton is currently the sole stockholder and President, Secretary, Treasurer and sole director of Helen B. Horton Realty, Inc., a real estate brokerage company in Port St. Lucie, Florida. HBC Ex. 1, p. 3. Horton learned from Lee that his wife, Alice Lee, was having discussions with Vernon Smith about applying for a new FM station in White City, Florida. Tr. 489-490. Ultimately, Mrs. Lee and Smith became principals in Midway Broadcasting Company, which is an applicant for a construction permit for a new FM radio station on Channel 284A in White City, Florida. HBC Ex. 1, p. 2; Tr. 285-287. Alice E. Lee is President and voting shareholder in Midway Broadcasting Company (ECI Ex. 4, p. 2; Tr. 287), and Vernon D. Smith is a non-voting shareholder (owning 65 percent of the equity) of Midway Broadcasting Company. HBC Ex. 1, p. 2; Tr. 285-286. Larry Lee is a State Farm Insurance agent in Fort Pierce, Florida, who is a friend of Smith. Tr. 286-287.

20. Smith, who is a banker by profession (Tr. 283), learned of the availability of the White City, Florida, and Port St. Lucie, Florida FM frequencies some time during the summer of 1989. Tr. 279-280; Tr. 365-366. Smith learned of these channel availabilities from articles in the newspapers in the Ft. Pierce-Port St. Lucie area and from two acquaintances of his who were in the radio business -- i.e., Bob Rowland and Wayne Dillon initiated these discus-

sions concerning the frequencies with Smith. Tr. 279. Apart from Smith's involvement as a non-voting stockholder in the respective applicants for Port St. Lucie, Florida, and White City, Florida, Smith has never been involved in any other broadcast application before the Federal Communications Commission (Tr. 477-478), nor has Smith previously been involved in any broadcast investments. Tr. 366. Smith initially developed an interest in becoming involved with a White City applicant, and he proceeded to attempt to ascertain information to see if he wanted to actually follow through with involvement in an application. Tr. 282-283. In this regard, Rowland had given Smith the names of several communications attorneys. Tr. 283. Smith also spoke with a banking attorney, David Baris, in Washington, whom Smith knew through his banking associations. (*Id.*). Baris gave Smith the names of one or two communications attorneys. Tr. 284. Ultimately, Smith did speak with two or three communications attorneys in an effort to ascertain what procedures were involved in the filing of applications, in order to determine whether he ought to become involved in an application. Tr. 284-285.

21. When Smith made the determination to become involved in an application for White City, Florida, he initially approached his friend, Larry Lee, with the suggestion that he become involved with him in the venture; however, Lee stated that he was not interested in participating in the application and he recommended his wife, Alice, instead, and she ultimately became the voting shareholder and President in the White City applicant – Midway Broadcasting Company. Tr. 287.

22. Smith also decided in the same time period to become an investor in an application for Port St. Lucie, Florida. Tr. 293, 450. Smith spoke with Larry Lee and asked him if he knew someone who was well-known, respectable, outstanding, publicly-minded and with good business acumen that Lee could recommend to him in Port St. Lucie. Tr. 293. Lee ultimately recommended Helen B. Horton to Smith. Tr. 294. Lee told Smith that he had known Horton for several years, that she was a very respectable woman, and that he had worked with her on various business matters over the years. Tr. 294. Lee further advised Smith that Lee had always found Horton to be an upstanding woman who could be trusted, and that she was a good businesswoman. Tr. 294-295. Furthermore, Lee advised Smith that, during a discussion with Horton, she had already expressed an interest in becoming involved in an application for Port St. Lucie. Tr. 295.

23. Prior to Larry Lee's discussion with Horton about the availability of FM frequencies in the Port St. Lucie area, Horton had not had any prior business dealings with Vernon Smith. Tr. 656. Prior to learning of the Port St. Lucie, Florida FM frequency from Lee, Horton had attended certain of the same social events that had been attended by Smith, and she had previously exchanged pleasantries with him. (*Id.*) Prior to her conversation with Lee concerning the Port St. Lucie frequency, Horton would have stopped and spoken to Smith if she had met him on the street. (*Id.*).

24. After Lee referred Smith to Horton, Smith called her. Tr. 295. He told her that he gotten her name from Larry Lee and that he understood that she might have an interest in the frequency that was to become available for Port St. Lucie. Tr. 296. Horton stated that she did have an interest in the matter, and she and Smith set up a meeting; they met at Horton's office in Port St. Lucie. Tr. 296. The first meeting between Horton and Smith concerning the Port St. Lucie application took place during August or September 1989. Tr. 488. The first face-to-face meeting between Horton and Smith took two or three hours and was designed to have the two parties become acquainted with one another. Tr. 297; Tr. 488.

25. During the initial face-to-face meeting, Smith told Horton about his background, his education, his family, his experience, and Horton, in turn, provided Smith with rather detailed information about her own personal background. Tr. 297. Horton advised Smith during their initial meeting that she had worked in Air Force Intelligence for 6-1/2 years, that she had been a supervisor, and that she had obtained a top secret clearance. Tr. 297-298. Horton further advised Smith that she had been employed by the District of Columbia Government for 15 - 20 years, where she was a director of policy and planning, that she had been in charge of a grant program between the federal government and the District of Columbia government, and that she had had over 100 employees that she supervised in her capacity. Tr. 298.[3]

26. Horton further advised Smith during their initial meeting concerning the Port St. Lucie application that her late husband had been a retired Administrative Law Judge before he died. Tr. 298. Horton had advised Smith that both she and her late husband had retired and moved to Port St. Lucie. Tr. 298. Horton further advised Smith that, after spending some time in retirement, she had become involved in real estate, which for her had been an entirely different field of endeavor from what she had previously been involved in. (*Id.*). Smith was made aware by Horton that she had thus changed her profession and had been able to become successful at her new profession in real estate, and that she had established her own real estate company which she owns and manages. Tr. 298-299.

27. During their first face-to-face meeting concerning the application, Horton and Smith did not discuss specific applicant structure or ownership divisions. Tr. 301. At the first meeting, Horton and Smith did discuss that she would be responsible for the radio station, and Smith made it clear that he was only interested in being a passive investor in the application. Tr. 303. Tr. 311. Smith further advised Horton that he was an investor in the White City application and that he would own 60 percent of the White City applicant. Tr. 489.

28. Horton was looking to Smith to become an investor with her in the Port St. Lucie application to help her defray the costs of the venture. Tr. 517. Had she been able to finance all of the costs associated with the Port St. Lucie venture, she would have done so and would not have been involved with Smith or any other investor. Tr. 517.

---

[3] Horton's specific title was the Director of Policy of the District of Columbia Department of Human Resources. Tr. 683. Horton's responsibilities in that position included the drafting of legislation for approval by the District of Columbia City Council, the establishment of a plan for reimbursement by the federal government to the District of Columbia, the establishment of procedures, programs, budgets, etc. Tr. 684-685.

29. At the initial meeting, Smith provided Horton with the names of several communications attorneys that he had received. Tr. 299, Tr. 505. Bob Rowland had provided Smith with the names of several communications attorneys, including that of Irving Gastfreund. Tr. 283, Tr. 314. One of the names mentioned by Smith to Horton was that of Irving Gastfreund. Tr. 506. Smith had spoken to Gastfreund prior to the time that the White City application of Midway Broadcasting Company had been filed with the Commission. Tr. 313. When Smith had had his conversations with the three communications attorneys, the Port St. Lucie frequency would not have come up during such discussions, since he was only interested in the White City frequency at that time. Tr. 323-324. Smith's conversation with Gastfreund had consisted of a discussion about the procedures for becoming involved in an FCC application. Tr. 314. Smith had also spoken with two other communications attorneys about FCC application procedures, one of whom was named Gaynes. Tr. 314-317. Prior to his involvement in the Port St. Lucie application, Smith did not have more than one conversation with Gastfreund, Gaynes or the third communications attorney, whose name Smith could not recall. Tr. 317-318. Gastfreund does not represent Midway Broadcasting Company before the Commission in connection with its White City, Florida, application; rather, Midway Broadcasting Company is represented by Dennis P. Corbett, of the firm of Leventhal, Senter & Lerman. ECI Ex. 4, p. 1. When given the names of the several communications lawyers by Smith, Horton indicated that she was planning to call the District of Columbia Bar Association to obtain referrals to communications attorneys. Tr. 299; Tr. 506.

30. By the end of their first face-to-face meeting concerning the Port St. Lucie application, Smith was very positive about Horton, her background, her experience, etc., but he wanted to do some further checking about her background. Tr. 299-300. Smith spoke with the manager of the Port St. Lucie office of the Riverside National Bank who had known Horton and her late husband. The manager, Tom Minch, had loaned money to Mr. and Mrs. Horton, had known Mrs. Horton in the community, had known that all of her business dealings, to his knowledge, had been good, and had known that she had paid back the loans that he had made at the bank to her; Minch stated that he had a high respect for her. Tr. 300. Minch stated that Mrs. Horton would be a good person to become involved with in a business venture. (*Id.*). In addition, Smith made further inquiries about Horton with several Administrative Board members of Riverside National Bank, and he received a very favorable response to his inquiries. Tr. 301. Four of the seven members of the Administrative Board were realtors (i.e., competitors of Horton in the real estate business), and they echoed what Minch had previously advised Smith about Horton; they also stated that she was a good realtor, an upstanding person and a very good competitor. (*Id.*). Moreover, Smith had received a good reference on Horton from Larry Lee, who had business dealings with her. Tr. 435.

31. In addition, Horton orally reviewed her personal financial statement with Smith. Tr. 380. Furthermore, Smith learned from Horton in their first meeting that she had had a "clean" record, that she had never been in any trouble, that she received a retirement check monthly from the District of Columbia Government, that she had never been bankrupt and never had any judgments against her. Tr. 436-437. In addition, Smith was able to corroborate the fact that Horton had no legal actions or liens pending against her through *The Meter* for St. Lucie County, which lists all of the legal actions, judgments, liens, etc. of which bankers stay abreast. Tr. 437.

32. After the initial meeting between Horton and Smith, Horton proceeded to ascertain information on the FCC application process by contacting an attorney. The first attorney that she contacted was Gastfreund. Tr. 576-577. In Horton's first conversation with Gastfreund, she sought information on the FCC application process. Tr. 583. During that initial conversation, Horton did not tell Gastfreund that she had a partner or an investor. Tr. 572. Horton had no recollection of Gastfreund having ever mentioned Vernon Smith during that conversation. Tr. 571-572. Although Horton had been planning to call the District of Columbia Bar Association to obtain the names of additional attorneys that she might be able to use, she did not do so. Tr. 573. After Horton spoke with Gastfreund, Horton saw no need to contact other possible attorneys, since the conversation between the two of them was extremely detailed and since he provided her with much information, and since she felt that he was very thorough and did not leave many things for her to guess at. Tr. 575. Horton felt that Gastfreund was very explicit about the things that needed to be done in connection with an application, and she personally felt satisfied with him. (*Id.*) Smith made no recommendations to Horton as to which of the attorneys he had mentioned should be selected by her. Tr. 455.

33. Following discussions with counsel, Horton and Smith discussed the structure of the proposed Port St. Lucie applicant and the equity division in the applicant as between Smith and Horton. Horton proposed an arrangement under which she would have 20 percent of the equity and Smith would have 80 percent of the equity. Tr. 398, Tr. 561. Horton insisted that she have control over the venture. Tr. 561-562; Tr. 590. Horton advised Smith that she wanted 100 percent voting control. Tr. 590. Smith advised Horton that he had no problem with the 80 percent/20 percent equity division and with giving Horton 100 percent voting control. Tr. 590, 609. Horton decided on a 20 percent equity share in the applicant for herself because that is all that she would likely be able to afford and based on advise of counsel. Tr. 592-594. In this regard, Horton pays her *pro rata* share (i.e., 20 percent) of all of Horton's expenses, and Smith pays his *pro rata* share (i.e., 80 percent) of Horton's expenses. Through the date of her testimony, Horton had personally invested over $35,000 in Horton. Tr. 682-683. In addition, under the terms of the proposed loan to Horton by First National Bank, the entire indebtedness will be fully guaranteed, both by Horton and Smith; this guarantee will be a full guarantee by each of the two individuals, and not simply a *pro rata* guarantee. Tr. 378-379.

34. Horton advised Smith early on in their discussions concerning the Port St. Lucie application that she did not wish to be involved unless she could be in control of the venture. Smith advised her that was amenable to him, since he was already quite busy running the banks with which he is involved. Tr. 406-407.

35. Smith recognizes that, as a non-voting shareholder in Horton, he is to be a passive investor. Tr. 451. Apart from his interests as a non-voting stockholder in HBC and in Midway Broadcasting Company, the only other investment in which Smith has ever been a passive investor was his investment as a limited partner in an oil and gas venture.

Tr. 475. In that business venture, Smith, as a limited partner, never had any contact with the general partner in the venture. Tr. 476.

36. Horton personally retained the services of HBC's consulting engineer, Bernie Segal. Tr. 617. Gastfreund had provided Segal's name to Horton, and she did not recall whether he also provided the names of several other engineers for her to consider. (*Id.*). Horton spoke with Segal, and he gave her a rundown on his method of operation, his fees, etc.; thereupon, Horton personally retained Segal's services.

37. Segal referred Horton to the two site location specialists that Horton ultimately retained -- i.e., Schaeffer and Company and TELSA. Tr. 618. Horton personally retained TELSA, which ultimately located HBC's transmitter site. Tr. 618. TELSA provided Horton with the location of the proposed site and with documentation of reasonable assurance of the site's availability. Tr. 618-619. TELSA also provided to Horton information as to the identify of the individual who was contacted as the representative of the site owner to provide reasonable assurance of site availability; this individual was Father Murphy of the Archdiocese of Palm Beach. Tr. 619.

38. Horton personally contacted Father Murphy to verify the availability of the transmitter site and also to verify the amount of funds necessary to obtain the use of the site from the Archdiocese of Palm Beach. Horton asked Father Murphy if he would be willing to sell the site to HBC, but Father Murphy refused on the ground that it would be more lucrative for the Archdiocese to lease the site to HBC than to sell it. Tr. 619.

39. Horton and her communications counsel jointly developed a staffing proposal for HBC's proposed station. Tr. 545-546. The staffing proposal formed the basis for a first quarter-year budget for staff salaries, developed by Horton and her communications counsel in consultation. Tr. 545. Counsel provided Horton with first quarter-year operational expenses for licensing fees. Tr. 546. Horton supplied information for the proposed budget relating to transmitter site rental, based upon discussions that she had had with Father Murphy. Tr. 546-547. Horton provided salary data to be included in the HBC budget for herself as General Manager, as well as secretary, receptionist and janitorial staff. Tr. 539.

40. Horton, in consultation with counsel, prepared those portions of the HBC budget that related to general administrative costs, advertising, etc. Tr. 524. HBC's consulting engineer prepared those portions of HBC's budget which related to technical matters (i.e., construction costs). Tr. 524.

41. Horton also developed the line item in HBC's budget for first quarter-year studio space rental costs. Tr. 670-680. In ascertaining the rental costs for studio space for HBC's proposed station, Horton obtained from her consulting engineer, Bernie Segal, an estimate of the number of square feet that would be needed for HBC's studios. (*Id.*). Upon obtaining that information from Segal, Horton checked locally in the Port St. Lucie area and developed an estimate of the rental cost for the square footage that had been provided to her by Segal. (*Id.*). Once the budget had been prepared for HBC's anticipated construction and first quarter-year operational expenses, a "cushion" was added. Tr. 548.

42. Thereafter, Horton proceeded to take steps to secure a letter of reasonable assurance of funding availability from a bank. Smith and Horton discussed five different banks in the area that were available as possible financing sources for the HBC venture. Tr. 478-479. These banks were Sun-Bank, Barnett Bank, Port St. Lucie National Bank, First National Bank of Stuart, and Florida National Bank. Tr. 479. There were only a few banks in the area. Tr. 481. Horton indicated to Smith that she had had prior business relationships with Florida National Bank as the result of borrowing by her clients at Florida National Bank, and that she desired to seek funding at that bank. Tr. 482; Tr. 387-388. Smith did not make any suggestions to Horton in an effort to steer her to Florida National Bank more than to any other bank that she and he had discussed. Tr. 484.

43. When Horton went to see Florida National Bank concerning a commitment letter, she had an appointment to see Doug Gilbert, president of the bank. Tr. 459, 518. Horton had previously met Gilbert at social occasions. (*Id.*). Horton's initial telephone inquiries at Florida National Bank concerning the loan for HBC actually started in the bank's Mortgage Department; that department advised Horton that she should speak with Gilbert. Tr. 519-520. Horton thereupon called Gilbert's secretary, advised the secretary of the purpose of her call, discussed with her the desire for a loan and arranged for an appointment with Gilbert. Tr. 520. Gilbert's secretary spoke with Gilbert and then advised Horton what documents to bring to the meeting with Gilbert. Tr. 520-521. Specifically, Horton was told to bring with her a personal financial statement for herself and for each of her investors, as well as tax returns for herself and for her investors for the last two years. Tr. 521. It was not suggested that Horton should bring in a budget or operating plan for the proposed station. (*Id.*). The meeting with Gilbert was scheduled for October 13, 1989. (*Id.*).

44. Prior to meeting with Gilbert on October 13, 1989, Horton requested from Smith, and obtained from him, copies of his personal financial statement and of his tax returns, so that she could take these documents with her to the bank. Tr. 381, Tr. 522. Horton also took with her to her meeting at the bank a copy of Horton's budget for anticipated equipment costs; Horton did not take with her a written copy of Horton's budget for anticipated first quarter-year operational expenses. Tr. 523.

45. When Horton met with Gilbert at Florida National Bank, she gave him Smith's personal financial statement and two years of Smith's tax returns, a copy of her own financial statement and two years of her own tax returns, plus a copy of HBC's budget for estimated costs of construction. Tr. 553-554. Horton had brought to the meeting a draft of a bank letter that had been furnished to her by HBC's counsel. Tr. 555. Although Horton gave the draft to Gilbert, he paid no attention to it and stated that he would prefer to draft the bank's letter the way he wanted it to read. Tr. 555-556.

46. Horton has never shown to Smith a copy of HBC's construction and first quarter-year operational budget. Tr. 404. The first time that Smith saw the Florida National Bank letter that supported HBC's application was either during the time of his preparation for this deposition in this proceeding or in the context of the hearing proceedings relating to the White City, Florida, application of Midway Broadcasting Company. Tr. 444.

47. Horton supplied the basic information for filing HBC's application to Gastfreund's office. Tr. 619-620. More particularly, Horton supplied the information concerning Smith to Gastfreund. Tr. 620. She obtained that information directly from Smith when she called and asked him for it. (*Id.*).

48. Smith never had any discussions with Horton as to what her salary was going to be at HBC's proposed station. Tr. 461-462. The only limit on the sums that Horton could pay herself is the amount of money in HBC's bank account. Tr. 462. Smith never discussed with Horton what the format of HBC's station would be or how many individuals would be employed on the staff of the HBC station, or whether the station would be a satellite operation. Tr. 462. Smith's decision to become involved as an investor in both a White City applicant and in a Port St. Lucie applicant had nothing to do with the proximity of the two communities to one another. Tr. 450. In deciding to become an investor in applicants for both communities, Smith did not consider the possibility that the stations in the two communities might be in competition with one another, because Smith understood that, as a passive nonvoting shareholder in each applicant, he would not be in a position to influence either station's operations and that he would not be in a decisionmaking position with respect to either of the stations. Tr. 450-451.

49. Horton has not talked to Smith or to Larry Lee or to Alice Lee about the format of HBC's proposed station. Tr. 503. Alice Lee has not discussed with Horton the plans which Mrs. Lee has for the format of Midway Broadcasting Company's proposed station in White City, Florida. Tr. 504.

50. Smith did not have any involvement in the retention of HBC's consulting engineer, in the location of HBC's transmitter site, or in the completion of HBC's application. Tr. 469. Rather, it was Horton who personally called Smith and asked him questions concerning himself to enable her to complete HBC's application. Tr. 470; Tr. 622-623. Other than providing a list of names of possible attorneys to Horton for her to contact, Smith played no other role in connection with the selection of counsel for HBC. Tr. 471. As noted above, Smith made no recommendations to Horton as to which of the attorneys (if any) that she should select. Tr. 455. Smith is not a signatory on the HBC bank account. Tr. 472. Smith did not play any role in the hiring of any of HBC's technical consultants. Tr. 473. Smith does not see copies of HBC's bank statements or cancelled checks. Tr. 474. He played no role in establishing the bank account for HBC. (*Id.*). Smith does not receive copies of any invoices from either HBC's attorneys, engineering consultants, or other consultants. Tr. 474. Prior to the time that Horton had her meeting with Gilbert at Florida National Bank to obtain a loan commitment letter, Smith did not have any conversations with Gilbert concerning HBC, nor has he ever discussed the financing of the Port St. Lucie station with Gilbert to date. Tr. 388-389. Nor did Smith go with Horton to visit Gilbert at the Florida National Bank to obtain the bank's loan commitment letter. (*Id.*). Similarly, Smith has never spoken with Richard Powers concerning HBC or the financing of its proposed station. Tr. 389. Power joined what had been Florida National Bank at the time that it became First Union Bank. Tr. 388.

51. There came a time when Horton advised Smith that HBC would have to change the bank on which it was relying for its bank letter as evidence of reasonable assurance of funding. Tr. 390. In this connection, Horton advised Smith that when Florida National Bank changed to First Union Bank that some of the officers had changed and that certain additional collateral would be required to support the bank loan commitment that had been issued by Florida National Bank. Tr. 390-391. Horton advised Smith that she had made the decision to change banks to First National Bank and Trust Company of Stuart. Tr. 390. Horton told Smith that she needed a new financial statement from him and his tax return so that she could go to First National Bank and Trust Company of Stuart. Tr. 391.

Diversification

52. Helen B. Horton has no mass communications media interests other than her interests as an officer, director and voting shareholder in HBC and in its application in this proceeding for a construction permit for a new FM radio station in Port St. Lucie, Florida. HBC Ex. 1, p. 2. HBC itself has no interest in any medium of mass communications (other than its interest in its pending application for Port St. Lucie, Florida in this proceeding). (*Id.*) Vernon D. Smith is a non-voting shareholder (owning 65 percent of the total equity) of Midway Broadcasting Company, applicant for a construction permit for a new FM radio station on Channel 284A in White City, Florida. (FCC File No. BPH-890914OD). HBC Ex. 1, p. 2.

Integration

53. In the event of grant by the Commission of Horton's application in this proceeding, Horton intends to work fulltime (i.e., a minimum of 40 hours per week, a minimum of eight hours per day, a minimum of five days per week) as the General Manager of HBC's proposed station. HBC Ex. 1, pp. 2-3. As General Manager, Horton will oversee and superintend the construction and operation of HBC's proposed station and will have ultimate responsibility for all decisions affecting the operation of the station. As General Manager, Horton will supervise the overall operations of the station, including its programming, sales, promotional, and internal administrative activities. HBC Ex. 1, p. 3. Horton will hire department heads and will oversee the hiring of other key station personnel. (*Id.*). Sales, programming, engineering, public affairs and news department heads (to the extent they are hired) are to report directly to Horton. (*Id.*). As General Manager of HBC's proposed station, Horton will be responsible for coordinating the efforts of the department heads to ensure that the station operates efficiently and is responsive to community programming needs and interests. (*Id.*). Horton will also have ultimate supervisory responsibility over all of the station's personnel. (*Id.*). Furthermore, Horton will act as the station's primary representative to the Port St. Lucie community and to the proposed station's service area at large. (*Id.*). In addition, Horton will be responsible for administration of the station's Equal Employment Opportunity Program. (*Id.*).

54. As noted above, Horton is currently the sole stockholder and President, Secretary, Treasurer and sole director of Helen B. Horton Realty, Inc., a real estate brokerage company in Port St. Lucie, Florida. HBC Ex. 1, p. 3. If HBC's application in this proceeding is granted, Horton intends to withdraw fully from all employment or business pursuits which require her time and attention and which might conflict with her proposal to serve as the full-time General Manager of HBC's proposed Port St. Lucie station.

HBC Ex. 1, pp. 3-4. More specifically, Horton intends to relinquish her status as the real estate broker of record of Helen B. Horton Realty, Inc., and to turn that position over to Eric C. Brent, who is Horton's son, and who is currently employed full-time by Helen B. Horton Realty, Inc., as the Broker-Manager of the corporation. HBC Ex. 1, p. 4; Tr. 627.

55. Horton would retain a stock ownership interest in Helen B. Horton Realty, Inc., in the event that HBC's application were granted, and, in such event, Horton's son would manage the real estate business of Helen B. Horton Realty, Inc. (HBC Ex. 1, p. 4; Tr. 627-628.) Although the precise percentage of the equity interest in Helen B. Horton Realty, Inc., that Horton proposes to retain has not been definitively decided upon (Tr. 627-628), Horton believes that she would probably retain no more than a 10 percent stock interest in Helen B. Horton Realty, Inc., if HBC's application in this proceeding is granted by the Commission. Tr. 627. If HBC's application is granted, Horton proposes to no longer work at Helen B. Horton Realty, Inc. Tr. 628. In this regard, if HBC's application is granted, Horton will not assist her son in closing real estate transactions. Tr. 628. Her son, Brent, does not presently use Horton's help in closing real estate transactions, since she trained him well; consequently, Horton does not anticipate that he would need her assistance in closing such transactions in the future. (*Id.*). Nonetheless, if Brent were to call Horton and ask for some information or advice, she would provide such information or advice to him, but would not be involved in working at the real estate business. (*Id.*). Helen B. Horton Realty, Inc. is Horton's only employment at the present time. Tr. 630.

56. Horton is a Black female. HBC Ex. 1, p. 4. Horton has resided continuously in the community of license (Port St. Lucie, Florida) from March 1, 1980 to the present, and she resided part-time (approximately 80 hours per month) in Port St. Lucie, Florida, from November 18, 1979 through February 29, 1980. HBC Ex. 1, p. 4. More specifically, Horton has resided continuously at her present address (i.e., 2866 S.E. Ginza Street, Port St. Lucie, Florida 34952) since March 1, 1980. HBC Ex. 1, pp. 4-5. Horton purchased the home on or about November 18, 1979, and, from that date through the end of February 1980, Horton resided at 2866 S.E. Ginza Street, Port St. Lucie, Florida 34952 on a part-time basis (approximately 80 hours per month). HBC Ex. 1, p. 5. Horton intends to continue to reside in Port St. Lucie, Florida, if HBC's application is granted. (*Id.*).

57. Horton has been involved in civic and community activities, both in Port St. Lucie, Florida (the proposed community of license), and in the area surrounding Port St. Lucie, Florida. (*Id.*). Horton has been a Member of the Friends of the St. Lucie County Library from October 1988 to the present. (*Id.*). She was a member of the Board of Directors of that organization from October 1988 to October 1989, and she has served as Vice President of the organization from October 1989 to the present. (*Id.*). From June 1989 to the present, Horton has served as a member of the Board of Directors of the Area Advisory Council on Aging (covering St. Lucie County, Palm Beach County and Martin County, Florida). HBC Ex. 1, p. 6. From April 1991 to the present, Horton has served as a member of the Executive Committee of the Board of Directors of the Area Advisory Council On Aging.

58. From October 1980 to June 1985, Horton served as a member of the Palm Glades Girl Scouts Council (covering the counties of St. Lucie, Martin, Okeechobee, Hendry, Indian River and Broward). (*Id.*). From June 1984 to June 1985, Horton served as Second Vice President of that organization, and from June 1985 to the present, Horton has served as Liaison for St. Lucie County for that organization. (*Id.*). From October 1981 to the present, Horton has been a member of the National Association of Retired Federal Employees. (*Id.*). From January 1984 to June 1985, Horton served as Editor of the newsletter of that organization. (*Id.*). From 1989 to the present, Horton has been a member of the St. Lucie, County, Florida Chapter of the NAACP. (*Id.*).

Auxiliary Power

59. HBC intends to install and maintain auxiliary power generating facilities for its proposed station at both its main studio location and at its transmitter site, to be used to maintain continuity of programming service by the station in the event of a loss of commercially-supplied electric power at either the transmitter site or at the studio location. HBC Ex. 2, p. 1.

Evett Communications, Inc. (ECI)

Corporate Structure

60. Evett Communications, Inc. (ECI) is a corporation organized under the laws of the State of Florida. ECI Ex. 1A, p. 1. ECI has two classes of capital stock: i.e., voting common stock and non-voting common stock. ECI Ex. 1, p. 3.

61. On the date of the filing of its *Statement of Integration and Diversification* in this proceeding,[4] Evett L. Simmons was the President and owner of 200 shares of voting stock in ECI, representing 100 percent of the issued and outstanding shares of ECI's voting stock, and representing 20 percent of the total equity of the corporation. ECI Ex. 1A, p. 1. Moreover, as of the date of the filing by ECI of its *Statement of Integration and Diversification*, William E. Summers, III, owned 700 shares of non-voting stock in ECI, representing 70 percent of the equity of the corporation, and Willie J. Martin owned 100 shares of ECI's non-voting stock, representing 10 percent of the corporation's equity. (*Id.*). The foregoing was the ownership structure of ECI from the date on which its application in this proceeding was filed with the Commission on October 18, 1989, through at least August 1991. Tr. 999-1003.

62. Subsequent to the filing by ECI of its *Statement of Integration and Diversification* in this proceeding, and subsequent to August 1991, Summers and Martin sold their non-voting stock in ECI to Salsa Radio, Ltd., a Florida limited partnership (Salsa). ECI Ex. 1A, p. 1; Tr. 999-1003. Salsa, in turn, sold 50 shares of ECI's non-voting stock (out of the 800 such shares which it had acquired from Messrs. Summers and Martin) to Simmons. (*Id.*). As a result of these transactions, Evett L. Simmons presently owns 200

[4] ECI's *Statement of Integration and Diversification* was filed in this proceeding on May 13, 1991.

shares of ECI's voting stock (representing 100 shares of the corporation's voting stock and 20 percent of the corporation's equity) and 50 shares of ECI's non-voting stock (representing a total of 5 percent of ECI's equity). (*Id.*). For comparative purposes in this proceeding, however, Simmons is claiming credit for her ownership of only a 20 percent equity interest in ECI. (*Id.*). Salsa owns 750 shares of non-voting stock in ECI, representing 75 percent of ECI's total equity. (*Id.*).

63. The sole general partner and 30 percent equity owner of Salsa is Jose Oaks. The sole limited partner and 70 percent equity owner of Salsa is Hilda Dawson.

64. Evett L. Simmons is presently the President, Secretary, Treasurer and sole director of ECI. ECI Ex. 1A, p. 1; Tr. 720. Nonetheless, Article VI of ECI's Articles of Incorporation provides that, while the corporation is to have one director initially, the number of directors in ECI may be increased from time to time. ECI Ex. 1, p. 4; Tr. 823-824. Simmons is an attorney at law whose practice includes small business corporation law. Tr. 719. Simmons claimed to have personally prepared and drafted ECI's Articles of Incorporation (Tr. 720); however, Simmons acknowledged that Vincent Pepper, of the firm of Pepper & Corazzini, had sent to her a complete draft of a sample set of Articles of Incorporation that she could use as a form. Tr. 816-817. In addition, Simmons claims that she may have looked at some forms contained in her corporate form books. Tr. 817. Simmons wanted to have the flexibility for ECI to increase the number of its directors in the future. Tr. 824. ECI is the first corporation that Simmons formed to have two classes of stock, i.e., both voting stock and non-voting stock. Tr. 720-721. Simmons had never previously personally invested in any corporation having both voting and non-voting stock. Tr. 721. Simmons took the actions necessary to form ECI on October 10, 1989, and executed the Articles of Incorporation of ECI, as the corporation's Incorporator, on October 10, 1989. Tr. 726; ECI Ex. 1, p. 5.

65. Under Article IV.B of ECI's Articles of Incorporation, the holders of ECI's non-voting stock are prohibited from: (a) having any involvement, either directly or indirectly, in the management or operation of the corporation or its business or businesses; (b) acting as an employee of the corporation, directly or indirectly; (c) serving in any capacity as an independent contractor or agent of the corporation; and (d) performing any services to or for the corporation or on its behalf other than making loans to, or acting as a surety for the corporation. ECI Ex. 1, pp. 3-4. Notwithstanding these prohibitions, Simmons owns 50 shares of ECI's non-voting stock (ECI Ex. 1A, p. 1; Tr. 1078-1079), and proposes to be employed at ECI's radio station in Port St. Lucie, Florida, as the General Manager of the station on a full-time basis. ECI Ex. 2, p. 1. There is no provision in either ECI's Articles of Incorporation or ECI's By-Laws that would prohibit a non-voting shareholder of the corporation from holding voting stock in the corporation, nor is there any other agreement in existence that would prohibit a non-voting stockholder in ECI from acquiring voting stock in the corporation. Tr. 1078-1079.

History of ECI's Formation And Application

66. The moving forces in the formation of ECI were its former non-voting stockholders, William E. Summers, III, and Willie J. Martin. During the late summer or early fall of 1989, Summers learned that a frequency would be opening up for applications for a new FM station in Port St. Lucie, Florida, and he thereupon telephoned Martin to ask him to locate a person who might serve as a voting shareholder in an applicant that Summers desired to form to apply for the Port St. Lucie frequency. Tr. 1140-1141, Tr. 1221. Summers particularly wanted to find out if Martin could locate a minority group member in Port St. Lucie to become involved with the application. Tr. 1221, 1141. At the time of Summers' initial conversation with Martin, it was clear in Summers' mind that the Port St. Lucie applicant was going to be a corporation, rather than a partnership. Tr. 1222. Summers' criteria for locating a suitable individual in Port St. Lucie to become involved with his application included local residence in Port St. Lucie, Florida, and civic involvement by the individual in Port St. Lucie, as well as past broadcast experience if possible. Tr. 1223. Summers decided early on that the applicant was going to be a "two-tiered" corporate entity -- i.e., one with voting and non-voting stock. (*Id.*). It was Summers' understanding that, if a corporate broadcast applicant has both voting and non-voting stock, and if the voting shareholder is proposed to be involved in the day-to-day operation of the proposed station, whereas the non-voting shareholder is not, that there is some comparative credit that could be garnered before the Commission in a comparative proceeding. Horton Ex. 21, p. 4. Moreover, it was Summers' understanding that if a corporate broadcast applicant had a single class of stock, all of which was voting stock, and if the ownership of only a portion of that voting stock was represented day-to-day in the management of the applicant's proposed station, the applicant would not be in a position to claim as great a comparative credit. (*Id.*). These considerations played a role in Summers' decision to seek to establish a "two-tiered" corporate applicant (i.e., an applicant with both voting and non-voting stock) for the Port St. Lucie frequency. (*Id.*).

67. Summers and Martin have known one another for the past 30 years. Tr. 1192. Summers and Martin are presently principals of Dale Broadcasting, Inc., an applicant for a construction permit for a new FM radio station at Ponte Vedra Beach, Florida. Tr. 1127-1128. Martin is President, Secretary and sole voting stockholder of Dale Broadcasting, Inc. (*Id.*). Martin is a Black American. Tr. 757-758. The sole non-voting shareholder in Dale Broadcasting, Inc., is William E. Summers, III. Tr. 1129. Martin's voting stock interest in Dale Broadcasting, Inc., accounts for a total of 20 percent of the equity of that corporation (Tr. 1129), and Summers' non-voting stock interest in Dale Broadcasting, Inc., accounts for the remaining 80 percent of the equity of Dale Broadcasting, Inc. (*Id.*). The law firm representing Dale Broadcasting, Inc., is Pepper & Corazzini, and the engineering consultant for Dale Broadcasting, Inc., is Mullaney Engineering, Inc. Tr. 1140.

68. The initial telephone call from Summers to Martin in which Summer asked Martin to locate a suitable individual who might serve as the voting shareholder for the contemplated Port St. Lucie applicant, took approximately five or six minutes. Tr. 1141. In response to Summers' call, Martin telephoned the City Manager of Eatonville, Florida, Ron Lavelle, to make some inquiries. Tr. 1143-1144. Lavelle referred Martin to Havert Fenn, who was a County Commissioner of St. Lucie County, Florida. Tr. 1143, 745-746. Ultimately, Fenn advised Martin that he had located a suitable individual and that he would arrange for a meeting with her. Tr. 1144-1145. The individual located by Fenn was Evett L. Simmons. (*Id.*).

69. Simmons received a call from Fenn asking her to come to his office for the purpose of introducing her to Martin. Tr. 746. Simmons did so and was introduced to Martin in Fenn's office in July or August 1989. Tr. 745-746. Fenn advised Simmons that Martin was looking for a civically-involved minority women that lived in Port St. Lucie, Florida, who might be interested in participating in an application for an FM station. Tr. 747. Prior to that meeting Simmons had never met with or spoken to Martin. Tr. 747, 1145, 1192.

70. At the initial meeting in Fenn's office, Martin advised Simmons that he was representing someone, Summers, who was looking for a local minority group member who is civically-involved in Port St. Lucie to be involved in an application that Summers intended to file for the Port St. Lucie frequency. Tr. 753. Martin told Simmons at the initial meeting that, if she decided to go forward as a participant in the application, she would have to make a commitment to give up the practice of law. Tr. 758-759, 1150. This was a condition precedent to Simmons being allowed to be part of the application that Summers intended to file. Tr. 759. Moreover, Martin advised Simmons that she would have to make a full-time commitment to the proposed station. Tr. 1150. Martin further advised Simmons that she would not be responsible for any expenses of the application apart from minor incidental expenses. Tr. 760. Simmons also understood that Summers would pay for all of the expenses incurred in connection with the application as well as for the expenses of construction of the proposed station. Tr. 760.

71. During the initial meeting with Martin, Simmons was told that the applicant would be a corporate entity having both voting and non-voting shareholders, and that Simmons would have 20 percent of the corporate applicant's equity as voting stock, and that the non-voting shareholders would have the remaining 80 percent of the equity in the corporation. Tr. 766. There was no negotiation that took place as between Martin and Simmons as to the particular percentage of the equity division. Tr. 766-767. Simmons did not argue that she wanted a higher equity percentage, since she perceived that she was not in a position to bargain about the matter. Tr. 767. Simmons had no recollection as to whether she asked any specific questions or received any specific background information about Summers during the initial meeting with Martin. Tr. 770. At the end of the initial meeting with Martin, Simmons advised Martin that she was enthusiastic to go forward with the venture as proposed. Tr. 769-770.

72. At the end of his initial meeting with Simmons in Fenn's office, Martin gave Summers' name to Simmons and advised Simmons that Summers would be in touch with her. Tr. 1151. Martin took Simmons' phone number and told her that he would be giving it to Summers. Tr. 1151-1152. Martin did not obtain from Simmons any information about her background. Tr. 1152-1153. He did not ask Simmons any questions or obtain information about her financial status or any similar data. (*Id.*). Subsequent to the meeting in Fenn's office, Martin communicated by telephone with Summers and provided Summers with Simmons' name and telephone number. Tr. 1153.

73. During the last week of July 1989, a few days after her meeting with Martin in Fenn's office, Summers telephoned Simmons. Tr. 783-784. That conversation was the first time that Simmons and Summers had ever spoken. Tr. 784. During that telephone call, which lasted approximately five minutes, Summers stated that he had spoken to Martin and that he wanted to meet Simmons. Tr. 785. A meeting was arranged and took place several days after the initial telephone call from Summers to Simmons. Tr. 786. This initial in-person meeting between Summers and Simmons took place at the Palm Beach Airport and lasted for approximately one hour. Tr. 786. During the initial face-to-face meeting between Summers and Simmons it was decided that she would become involved in the Port St. Lucie applicant as President and voting shareholder of a corporation that was to be formed to be the Port St. Lucie applicant. Tr. 1233-1234, Tr. 787. During the meeting, Summers told Simmons that she was to have 20 percent of the total equity of the corporate applicant, all in the form of voting stock, and that he and Martin would be non-voting stockholders in the corporate applicant who, together, would own the remaining 80 percent of the corporation's equity. Tr. 787-788, Tr. 791, Tr. 793, Tr. 1234. There was no negotiation of any of the equity percentages during the meeting between Summers and Simmons. Tr. 794, Tr. 1234. Simmons did not believe that she was in a position to bargain or negotiate the equity percentage that Summers had told her that she would have in the corporation. Tr. 794.

74. Summers advised Simmons during their initial face-to-face meeting that Simmons would not be liable or responsible personally for any of the financial obligations of the corporate applicant that was to be formed and that Summers would pay for all of the applicant's expenses, except for Simmons' capital contribution to purchase her stock interest in the corporation. Tr. 795, Tr. 1235. Summers told Simmons that she had to purchase and pay for her 20 percent stock interest in the corporate applicant. Tr. 1234-1235. More particularly, Summers told Simmons that the purchase price that she would have to pay for her stock in the corporation was $200. Tr. 1235-1236. Summers told Simmons during the initial meeting that Simmons would have to give up the practice of law to become the General Manager of the proposed station. Tr. 795.

75. At the time of Summers' initial face-to-face meeting with Simmons at the Palm Beach Airport, Simmons was a total stranger to Summers. Tr. 1264. During the meeting with Summers, Simmons did not provide Summers with any resume, nor with any personal balance sheet or personal financial statement. Tr. 796-797. Summers did not ask to see a personal balance sheet or a personal financial statement for Simmons, either during their initial face-to-face meeting or at any point prior to the filing of ECI's application in this proceeding. Tr. 797, Tr. 1233. Summers never asked Simmons whether she had ever been convicted of a crime. Tr. 797-798 and 1233. Summers never asked for any information about Simmons' credit history. Tr. 798 and 1233. Summers never asked for information as to whether Simmons had ever filed for personal bankruptcy or whether she had ever been declared insolvent, nor did Simmons volunteer such information. Tr. 1233 and 800. Summers never subsequently checked on Simmons' credit rating. Tr. 1233. Moreover, Summers never asked Simmons whether she had any judgments against her or whether she had ever managed a business up until that point. Tr. 800-801. Summers did not inquire, and Simmons did not volunteer, any background information that would have led Summers to believe that Simmons had management

abilities over a business.[5] Tr. 801. However, by the initial face-to-face meeting between Summers and Simmons, Summers had been made aware by Martin that Simmons had no prior broadcast experience. Tr. 147.

76. By the end of the initial face-to-face meeting, Simmons and Summers had verbally acknowledged that they had agreed to go forward with the venture of filing an application for Port St. Lucie, Florida. Tr. 787. Summers never considered anyone other than Evett Simmons for the position of voting stockholder in ECI. Tr. 1265. During the initial face-to-face meeting at the Palm Beach Airport, Summers directed Simmons to contact the law firm of Pepper & Corazzini, who ultimately came to act as communications counsel for ECI. Tr. 803 and 805, 1247. Summers directed Simmons to Vincent Pepper of the firm of Pepper & Corazzini, because Pepper has served as Summers' attorney in broadcast-related matters for 40 years. Tr. 1247. Summers felt justified in directing Simmons to use the services of Pepper and his firm because "it was a part of my business since I was going to be the investor." (*Id.*) Simmons knew that Summers would be paying the expenses of Pepper & Corazzini in connection with the application. Tr. 804. Summers further advised Simmons during their initial face-to-face meeting that Pepper had represented Summers in various broadcast ventures. Tr. 804-805.

77. Summers and Pepper have been in business together as partners in the ownership of radio stations. Tr. 805. Summers and Pepper were principals of Summers Enterprises, Inc., which was the licensee of Radio Stations WLOU(AM) and WNOU(FM) in Louisville, Kentucky, from 1972 until 1982. Tr. 805. From 1951 to 1972, Pepper represented a broadcast station which was managed by Summers. (*Id.*).

78. If Summers wants to find out anything about the Port St. Lucie proceeding, he feels free to pick up the telephone and call Pepper & Corazzini. Tr. 1259. Summers has, in fact, made such calls, and he feels free to do so because the individuals in the firm are his attorneys. (*Id.*). In this regard, when Summers reached a decision that he desired to dispose of his interest in ECI, he so advised Vincent Pepper, and did not directly advise Evett Simmons. Tr. 1260. Summers has never spoken to Simmons about his disposition of his non-voting stock interest in ECI to Salsa. Tr. 1263.

79. In compliance with Summers' directive, Simmons called Pepper at Pepper & Corazzini a few days after her meeting with Summers at the Palm Beach Airport. Tr. 810. During her initial telephone call to Pepper, Simmons received the impression that Pepper was already familiar with the fact that Summers, Martin and Simmons were going to be pursuing an application for Port St. Lucie, Florida. Tr. 813-814. The initial telephone conversation between Simmons and Pepper was short (Tr. 826), and, during the conversation, Pepper advised Simmons that her communications with Summers and Martin would henceforth be limited. Tr. 826. Either Pepper or another attorney in his law firm gave Simmons the name of the consulting engineer (John Mullaney of Mullaney Engineering, Inc.) that was ultimately retained on behalf of ECI. Tr. 826-827. Simmons could not recall signing any retainer letter with either Mullaney's firm or the firm of Pepper & Corazzini. Tr. 830. Mullaney recommended and referred Simmons to a site selection specialist, TELSA, Inc. Tr. 832.

80. Mullaney also serves as the consulting engineer for Dale Broadcasting, Inc., the applicant for a new FM station in Ponte Vedra Beach, Florida, in which Summers and Martin are principals, and which is represented by the firm of Pepper & Corazzini before the Commission. Tr. 834, 836. John Mullaney also served as the consulting engineer for WNKI, Inc., which was an applicant for a construction permit for a new FM station in Orlando, Florida. Tr. 835. WNKI, Inc., was also a "two-tiered" corporate entity, having voting and non-voting stock. All of the voting stock of that corporation (accounting for 20 percent of the corporation's equity) was owned by Ms. Nicki Sarner, a Hispanic female, and all of the non-voting stock in WNKI, Inc. (accounting for 80 percent of the corporation's equity) was owned by William E. Summers, III. Tr. 835. The law firm of Pepper & Corazzini also served as counsel for WNKI, Inc. Tr. 836.

81. William E. Summers, III, also was an individual applicant for a construction permit for an FM station in Louisville, Kentucky, and John Mullaney was the consulting engineer for that application, and the applicant was represented by Pepper & Corazzini. Tr. 835-836. Mullaney was and has been at all times the consulting engineer for the radio stations licensed to Summers Enterprises, Inc. (i.e., Radio Stations WLOU(AM) and WNOU(FM), Louisville, Kentucky), which licensee was jointly owned by Summers and Vincent Pepper. Tr. 836 and 805. Moreover, from 1951 to 1972, John H. Mullaney, Sr. (the father of John Mullaney), served as the consulting engineer for the radio station which was managed by Summers and which was represented at the time by Pepper. Tr. 836 and 805. The law firm of Pepper & Corazzini has represented Martin for approximately 23 years. Tr. 1184.

82. As noted above, either Pepper or one of the other attorneys at Pepper & Corazzini directed Simmons to John Mullaney, who was ultimately retained as the consulting engineer for ECI. Tr. 826-827. In similar fashion, ECI's counsel (Neal Friedman of the firm of Pepper & Corazzini) directed Simmons to a second consulting engineer, Neil M. Smith of the firm of Smith & Powstenko, to act as a substitute consulting engineer for ECI. Tr. 841-845. Simmons did not personally retain Smith or his firm; she has never spoken with him. Tr. 842. Rather, ECI's counsel, Friedman, retained Smith's services. Tr. 842-845. Friedman suggested the substitution of consulting engineers on behalf of ECI based on his own view of cost considerations -- i.e., that Smith would charge less for his service than would Mullaney. Tr. 844-845.

83. Simmons did not do anything to personally ascertain the accuracy of the information reflected in Exhibit 1 of ECI's application, which lists the other media interests of principals of ECI. Tr. 951-952. The first time that she received the exhibit was when she received the final draft of the ECI application from counsel for signature. Tr. 949. Simmons never contacted Willie Martin to ask him about his other media interests -- i.e., what they were, where they were located, etc. Tr. 949. Simmons did not make any changes to the draft of Exhibit 1 that she received from her counsel, nor did she question anyone at Pepper & Coraz-

[5] Prior to the filing of ECI's application, Simmons was an employee at a law firm owned by individuals other than herself. Tr. 981. Simmons did not come to form her own law firms, Simmons, Fisher and Solomon, until January 1991. Tr. 736.

zini regarding the accuracy of the information reflected therein, and she just assumed that it was accurate. Tr. 951-952.

84. By letter dated October 3, 1989, Summers sent to Simmons a check in the amount of $10,000, in accordance with instructions which he had received from Vincent Pepper. HBC Ex. 6; Tr. 882; Tr. 1269-1270. Simmons did not call Summers to ask him for the $10,000 check. (*Id.*). Of this $10,000, $700 was used as a capital contribution to ECI for the purchase by Summers of his non-voting stock in ECI, and the remaining $9,300 was an initial contribution toward the expenses of ECI. Tr. 847, Tr. 997-998. Simmons received a check in the amount of $100 from Willie Martin in payment for his shares of non-voting stock in ECI, and Simmons paid the total sum of $200 to ECI for the totality of her shares of voting stock in ECI. Tr. 847, 995. Simmons issued the shares of stock in ECI to herself, Summers and Martin after the Articles of Incorporation of the corporation were filed, but prior to the time that ECI's application was filed with the Commission. Tr. 994.

85. Mullaney retained the firm of TELSA, Inc., as ECI's site acquisition specialist, and TELSA located a transmitter site for ECI's application. Tr. 940. Simmons does not have any recollection of ever having had any direct conversations with anyone at TELSA. Tr. 941, Tr. 832. Simmons acknowledged that Mullaney may have retained TELSA's services himself. Tr. 832. Simmons first found out from her consulting engineer that TELSA had located a transmitter site. Tr. 940-941. At no point on or prior to the date of the filing of her application with the Commission on October 18, 1989 had she ever personally spoken with Father Murphy (representative of the owner of the transmitter site proposed by ECI) about the availability of the site for use by ECI. Tr. 946.

86. Simmons learned from her communications counsel and from the blank FCC Form 301 that was sent to her by her counsel that she would have to prepare a budget for ECI's anticipated construction and first quarter-year operational expenses. Tr. 847. Simmons contacted Willie Martin and asked him if he could prepare a suggested operating budget for ECI's proposed station. Tr. 850. Aside from his own broadcast interests, Martin acts as a consultant for broadcast matters. Tr. 1199.

87. Martin prepared the entire staffing proposal for ECI's proposed station and projected salaries for each of the staff positions. Tr. 1167-1168. Martin prepared an entire budget for the anticipated first quarter-year operational expenses for ECI's station and a staff position salary list and sent the material to Simmons on October 5, 1989. HBC Ex. 3; Tr. 849-850. By October 5, 1989, when Martin sent Simmons the draft budget, Martin knew that he was going to be a non-voting shareholder in ECI. Tr. 1164. Significantly, Martin sent a copy of his cover letter of October 5, 1989, together with the budgetary materials, directly to the firm of Pepper & Corazzini. HBC Ex. 3; Tr. 1164-1166. Martin keeps Pepper informed of every move he makes with regard to anything pertaining to broadcasting. Tr. 1166. Martin had no recollection as to whether he discussed with Simmons whether his budget should be sent by him to Pepper & Corazzini prior to the time that he sent a copy to Pepper & Corazzini. (*Id.*).

88. To prepare his draft for ECI (HBC Ex. 3), Martin personally conducted research and made phone calls to gather information. Tr. 1192. Specifically, he called sources in the Port St. Lucie/Ft. Pierce, Florida area to ascertain what the salary scale happened to be in that area. Tr. 1193. Martin personally called these information sources himself and did not suggest to Simmons that it would be more appropriate for her to make the calls rather than for him to do so. Tr. 1199-1200.

89. By letter dated October 17, 1989, Simmons transmitted to John Garziglia, of the law firm of Pepper & Corazzini, a copy of ECI's final budget of anticipated construction and first quarter-year operational expenses. HBC Ex. 4, pp. 2 and 3. The staffing proposal set forth in ECI's final budget (HBC Ex. 4, p. 3) is identical to the staffing proposal prepared by Martin, which had been sent to Simmons by Martin on October 5, 1989. HBC Ex. 3, p. 2. Moreover, the estimated salaries for each of the staff positions proposed by Martin are identical on both ECI's final budget (HBC Ex. 4, p. 3) and on Martin's draft budget (HBC Ex. 3, p. 2), except for the salary figure for the position of General Manager. The General Manager's salary is listed as $2,500 per month in Martin's draft budget (HBC Ex. 3, p. 2), whereas the final ECI budget transmitted by Simmons to Garziglia (of the firm of Pepper & Corazzini) lists the General Manager's salary as $3,500 per month (HBC Ex. 4, p. 3), thereby increasing the total estimated monthly salaries by $1,000 per month. (*Id.*). Similarly, the line items set forth in ECI's final budget as categories of monthly operating expenses (HBC Ex. 4, p. 2) are identical to the line items describing monthly operating expenses prepared by Martin and reflected in his budget. HBC Ex. 3, p. 3. With respect to the actual budgeted figures for each of these line items of categories of monthly expenses, most of the expense figures in the final version of the ECI budget (HBC Ex. 4, p. 2) were identical to those which had been budgeted by Martin in his draft of the ECI budget. HBC Ex. 3, p. 3. However, Simmons increased the line item for salaries since she had increased the amount of compensation payable to herself as General Manager, thereby also necessitating an increase in the budgeted amount for payroll taxes. Tr. 858. She also increased the figure for office rent and for transmitter site rental to reflect information that she had on these items. Tr. 858.

90. The portion of ECI's final budget which breaks down anticipated construction expenses (HBC Ex. 4, p. 2) was derived from a draft of a budget of such anticipated construction costs which had been prepared by Mullaney Engineering, Inc., and sent to Simmons. Tr. 860, HBC Ex. 5.

91. Summers, acting completely on his own, procured the Bank of Louisville letter (HBC Ex. 7) as a consequence of his meeting with Orson Oliver, President of the Bank, on October 10, 1989. Tr. 1236-1237. Summers has had a banking relationship with the Bank of Louisville for the past 50 years. Tr. 1238. Simmons did not attend the October 10, 1989 meeting between Summers and Oliver. Tr. 1238. Simmons has never been in contact with the Bank of Louisville. (*Id.*). Summers did not come to the meeting with Oliver with any documents relating to the proposed operation of ECI's proposed station, and Oliver did not ask to see any budget materials for ECI or its proposed station. Tr. 1238-1239. All that Oliver asked relating to ECI during the meeting was a total dollar figure as to the amount of money that Summers would need to cover the anticipated expenses for the Port St. Lucie application. Tr. 1239. Summers did not provide Oliver with any model or draft bank letter for Oliver to use. (*Id.*). However, Oliver had previously issued other similar loan commitment letters to Summers in the past. Tr. 1239.

92. Summers provided Oliver with the dollar figure of the aggregate amount of funding (i.e., $427,000) that Summers determined would be needed by ECI, and that is the amount that is reflected in the Bank of Louisville letter. Tr. 1240-1242, HBC Ex. 7. Summers arrived at the $427,000 figure based on the total budgetary costs provided to him by Simmons; however, based on Summers' own experience, he added an additional sum to provide her with a "cushion" of approximately $19,000, thereby yielding the total aggregate amount of $427,000 reflected in the Bank of Louisville letter. Tr. 1240-1241. Summers did not recall ever seeing ECI's budget. Tr. 1242. Oliver had a copy of Summers' personal financial statement on file, but Oliver was never supplied with a personal financial statement for Simmons or for Martin, nor did he ask for same. Tr. 1243-1244. Summers never discussed with either Simmons or Martin the fact that the Bank of Louisville letter requires the personal guarantees of the shareholders of ECI. Tr. 1244. Summers returned to the offices of the Bank of Louisville on the morning of October 11, 1989, to pick up the Bank's letter (which was dated October 11, 1989) (Tr. 1245-1246; HBC Ex. 7), but the letter had not yet been signed by Oliver. Tr. 1245-1246. Later in the day on October 11, 1989, an individual at the Bank of Louisville called Summers to confirm that the Bank letter had been sent out to Simmons. (*Id.*).

93. Simmons did not know from whom she received the Bank of Louisville reasonable assurance letter. Tr. 898. Although the Bank letter states that the minimum security for the loan will be the personal guaranties of the shareholders of ECI (Tr. 899, HBC Ex. 7), Simmons took no steps to ascertain whether the stockholders of ECI would be willing to provide their personal guaranties. Tr. 903. Neither Summers nor Martin ever volunteered that they would be willing to provide their personal guaranties. Tr. 903. Indeed, it was Martin's understanding that he would not be personally liable for any of the expenses of ECI. Tr. 1158. Martin never paid anything in connection with ECI's expenses over and above the $100 that he paid for his stock interest in ECI. Tr. 1159. Martin never provided his personal balance sheet to either Summers or Simmons. Tr. 1159. Martin was never advised that the Bank of Louisville required that the minimum security for the loan would be the personal guaranties of the shareholders of ECI. Tr. 1181. Martin never agreed to provide his personal guarantee for the indebtedness that might be drawn from the Bank of Louisville by ECI. Tr. 1181. Indeed, at his deposition, Martin testified that, if he were asked to provide such a guarantee, he would have refused to give such a personal guarantee. Tr. 1183.

94. Summers never called Simmons to ask her if she would be willing to personally guarantee the loan from the bank of Louisville. Tr. 930. Simmons has never provided a personal balance sheet to Summers or to the Bank of Louisville. Tr. 930-931. Simmons never provided her personal balance sheet to the firm of Pepper & Corazzini other than the one that was exchanged subsequent to July 19, 1991. Tr. 931. Simmons never provided a personal balance sheet of hers to Willie Martin nor did she ask Martin for his own personal financial statement. Tr. 931.

95. As recently as May 1, 1991, Summers was directing Simmons in matters pertaining to ECI's application. More specifically, on May 1, 1991, Summers wrote to Simmons to enclose a check in the amount of $7,500. (HBC Ex. 11. Summers therein directed Simmons to "... issue check in amount of $6,750.00 to FCC or whatever the correct amount should be." (*Id.*). Summers further directed Simmons to: "send to Vince Pepper to file with FCC." (*Id.*).[6]

96. During the summer of 1991, Summers made a determination to dispose of his interest in ECI. Tr. 1213. Summers reached this determination after considering the Port St. Lucie matter, his age, and the length of time that it would take to resolve this proceeding. (*Id.*). He consequently asked his attorneys at Pepper & Corazzini to find someone to acquire his non-voting stock interest in ECI, and he wanted to dispose of his interest in ECI even if it meant doing so at a financial loss to himself. Tr. 1213. In the event that Summers could not have sold his interest to anyone, he still desired to rid himself of his interest in ECI. (*Id.*). Summers' personal health and the health of his wife were factors in his decision. Tr. 1214. However, he never communicated to Simmons his desire to divest his stock interest in ECI. Tr. 1214-1215. Summers never discussed with Pepper or any other attorney the subject of Willie Martin disposing of his stock interest in ECI. Tr. 1216. Ultimately, Pepper advised Summers that he (i.e., Pepper) had found a party who would be interested in acquiring Summers' stock in ECI, and Pepper identified that party as Salsa. Tr. 1216. Summers left to Pepper the details of handling the disposition of Summers' stock to Salsa, and Summers never spoke directly to or met with any representative of Salsa concerning the matter. Tr. 1216-1217.

97. Simmons first learned that Summers and/or Martin wanted to sell their respective stock interests in ECI some time during August 1991. Tr. 1004. Simmons first learned of this fact from her communications counsel, either Pepper or Neal Friedman, of the firm of Pepper & Corazzini. Tr. 1006-1007. Upon inquiring as to the reason for Summers' desire to dispose of his interest in ECI, Simmons was told that Summers was getting up in age and that there were health problems in his family. Tr. 1007. Martin never discussed his proposed sale of his stock interest in ECI with Summers or Simmons. Tr. 1176. Martin was advised by Pepper of Summers' contemplated disposition of his stock interest in ECI. Tr. 1175-1176. Simmons could not explain why a purportedly passive, non-voting stockholder, such as Summers, would find it desirable to get out of ECI's application for health reasons. Tr. 1008-1011. Simmons never did ask Summers why he was desirous of disposing of his interest in ECI. Tr. 1012.

98. Summers has never spoken with Simmons about his disposition of his stock interest in ECI to Salsa and the consequences of his departure from ECI's application. Tr. 1263. Martin was advised by Pepper that Summers wanted to dispose of his stock interest in ECI, and, during that conversation, Martin advised Pepper that he (Martin) therefore wanted to dispose of his own stock interest in

[6] Summers believes that one of the attorneys at Pepper & Corazzini may have sent him a list of the competing applicants in this proceeding, and that the firm may have furnished him with an analysis of the competing applications. Tr. 1209-1212.

ECI. Tr. 1190-1191. Martin never discussed the sale of his stock interest in ECI or the sale of Summers' stock interest in ECI directly with Simmons. Tr. 1191.[7]

99. The negotiations that led to the ultimate disposition of the respective stock interests of Summers and Martin in ECI to Salsa began during August 1991. Tr. 1021. Simmons first met Jose Oaks (Salsa's sole General Partner) during the middle of August 1991. Tr. 1021-1022. Present at the meeting was Kenneth Dawson, who is a friend of Oaks[8] and who is the son of Hilda Dawson, the sole limited partner in Salsa.[9] Tr. 1023. Simmons had never met Dawson prior to the meeting, and Oaks had not informed Simmons that he was bringing Dawson to the meeting. Tr. 1024. During the meeting, the proposed agreements contemplating the advent of Salsa into ECI were discussed. Tr. 1028. Dawson did not participate in the substantive discussion. Tr. 1029-1030.

100. At all times prior to August 31, 1991, aside from Simmons' payment of $200 for her stock interest in ECI, and aside from some minor incidental expenses totalling less than $1,000, three have been no expenses which she has incurred in connection with ECI or its application for which she has either not been reimbursed or was not capable of being reimbursed. Tr. 774-776. In this connection, Simmons was reimbursed by Salsa for the value of her services as an attorney for ECI in the amount of approximately $1,600. Tr. 781.

101. Hilda Dawson, the sole limited partner of Salsa, first learned about the possibility that Salsa might become a non-voting shareholder in ECI when Jose Oaks called her and told her that there was another applicant (i.e., ECI) that he felt was stronger, from a comparative standpoint in this proceeding, than Salsa because ECI had a voting shareholder who was a minority female that lived in Port St. Lucie. Tr. 1290. Oaks therefore advised Mrs. Dawson that it would be to Salsa's advantage to merge with ECI by purchasing the non-voting stock interests of ECI's non-voting stockholders at the time. Tr. 1291. Mrs. Dawson was agreeable to the proposal and sent Oaks a check for $25,000 which was to be paid to Summers and Martin for their respective stock interests in ECI. Tr. 1292.

102. As a result of the restructuring of ECI to bring Salsa into ECI as a non-voting shareholder, ECI is presently relying, for reasonable assurance of funding for its anticipated construction and first quarter-year operational expenses, on a loan commitment of $408,211 from Hilda Dawson. Tr. 1052. This loan commitment is set forth in Paragraph 3 of the August 26, 1991 Agreement between Simmons, ECI and Mrs. Dawson. HBC Ex. 9, p. 9. Simmons never communicated with Mrs. Dawson directly concerning Mrs. Dawson's loan commitment to ECI. Tr. 1053.

103. Before making the commitment to loan the sum of $408,211 to ECI, Mrs. Dawson never met or spoke to Simmons; indeed, prior to the week of hearings in this proceeding during the week of December 13, 1991, Mrs. Dawson had never met Simmons and had never spoken with her. Tr. 1294. Mrs. Dawson never obtained or requested a personal balance sheet of Evett Simmons. Tr. 1293. Prior to the time that Salsa acquired its non-voting stock interest in ECI, Mrs. Dawson never obtained nor requested information as to whether Simmons had ever been convicted of any crime. Tr. 1293. Moreover, prior to the time that Salsa acquired its stock interest in ECI, Mrs. Dawson never requested nor obtained any information as to whether Simmons had ever filed for personal bankruptcy or had any bankruptcy proceeding pending. Tr. 1293-1294. Nor did Mrs. Dawson ever ask for information or receive information as to whether Simmons had any judgments pending against her or her business. Tr. 1294. Mrs. Dawson did not know whether Simmons had any previous broadcast experience, and she never asked whether Simmons had any operational experience running a radio station before. Tr. 1314. Before this proceeding began, Evett Simmons was a total stranger to Mrs. Dawson. Tr. 1318. Mrs. Dawson has done no background check of any kind on Simmons. (*Id.*).

104. During the initial face-to-face meeting between Oaks and Simmons, Oaks did not ask Simmons what her salary or compensation was, and Simmons did not volunteer such information to him. Tr. 1044. Although Simmons may have provided Oaks with a personal financial statement for herself (Tr. 1044-1045), Oaks did not, during this initial meeting, request or obtain any information from

---

[7] Summers' and Martin's respective testimony that they never discussed directly with Simmons the disposition of their respective stock interests in ECI (Tr. 1260-1263; Tr. 1190-1191) is corroborated by Simmons' testimony. Tr. 1006-1007; Tr. 1012. Simmons' testimony is in conflict, however, with the representations made by her in her August 26, 1991 Declaration, set forth as Attachment 1 to ECI's August 27, 1991 *Petition For Leave to Amend and Amendment* in this proceeding. See HBC Ex. 10, pp. 13-14. Simmons stated in that Declaration as follows:

> "Within the last two weeks, I have been informed by both Willie J. Martin and William E. Summers, III that, for business and personal reasons, they no longer desired to continue as nonvoting shareholders in my application, and further, will no longer honor their financial commitment to the applicant. Although they have told me that they are still financially capable of fulfilling their commitment to Evett Communications, Inc., they have decided not to pursue this investment opportunity."

HBC Ex. 10, p. 13.

[8] Oaks has known Kenneth Dawson since the late 1970s. Tr. 1336. Kenneth Dawson, who lives in Boca Raton, Florida drove Oaks from his hotel at the Palm Beach airport to the meeting in Port St. Lucie and also drove Oaks back to his hotel after the meeting. Dawson was unaware of Oaks' travel from his home in Connecticut to Palm Beach until Oaks called him on his arrival in Palm Beach. Tr. 1402-1404, 1409. While Oaks and Dawson are personal friends, they have never been involved in a business relationship. Tr. 1339.

[9] Oaks performed certain financial services for the radio stations that Mrs. Dawson or her late husband operated in Connecticut. Tr. 1337-1228. Oaks is a Certified Public Accountant and performed accounting services for the Dawsons. Tr. 1338-1339. Oaks was a voting shareholder in Urban Broadcasting Corporation, which was an applicant for a construction permit for a new FM radio station in Orlando, Florida; Mrs. Hilda Dawson was also formerly a voting shareholder in Urban. Tr. 1339-1340. Oaks was an officer and proposed integrated principal of Urban Broadcasting Corporation. Tr. 1342-1343. The comparative hearing involving the competing Orlando applications was settled by a merger of several of the applicants, and the surviving entity was called Radio Orlando, which ultimately constructed the station. Tr. 1340. Urban Broadcasting Corporation, or its principals, became participants in Radio Orlando. Tr. 1340.

Simmons concerning her personal background other than her civic involvement, her church involvement, her family and her upbringing. Tr. 1045. Thus, Oaks never sought or obtained information from Simmons as to whether she had ever been convicted of a crime, whether she had ever filed for personal bankruptcy or whether she had ever been declared insolvent, whether she had any judgments against her, nor did he obtain any information concerning Simmons' credit history. Tr. 1045. Up until the negotiations contemplating acquisition by Salsa of a non-voting stock interest in ECI, Simmons was a total stranger to Oaks. Tr. 1426-1427. By the conclusion of the first face-to face meeting between Oaks and Simmons, the two had essentially negotiated the final terms of the agreements contemplating acquisition by Salsa of a stock interest in ECI. Tr. 1045.

105. In previous instances where Oaks and Mrs. Dawson have been involved in broadcast ventures, Oaks has always been a voting shareholder or general partner. Tr. 1415-1416. Specifically, Oaks and Mrs. Dawson were voting shareholders in Urban Broadcasting Corporation and were actively involved in the management of the radio station ultimately constructed by Radio Orlando in Orlando, Florida. Tr. 1415-1416; Tr. 1339-1343. Moreover, in his capacity as sole General Partner of Salsa, Oaks had formerly been proposed to be involved in the management of the radio station proposed by Salsa in its now-dismissed application in this proceeding. Tr. 1416. Oaks claims he will remain totally passive with respect to the management and operations of ECI and its proposed station. Tr. 1416.

106. Yet, by the same token, Mrs. Dawson looks to Oaks to protect her investment in ECI. Tr. 1417. As noted above, Mrs. Dawson has committed to loan to ECI the maximum amount of $408,211 for ECI's construction and first quarter-year operational expenses. HBC Ex. 9, p. 9. To protect, Mrs. Dawson's substantial investment, Oaks has structured the investment in the form of a loan to ECI, rather than as an equity contribution from Mrs. Dawson. Tr. 1417. Moreover, Oaks has structured the transaction to be a secured loan, secured specifically by all of the station's assets, and secured, as well, by the personal guarantee of Evett Simmons on the promissory note evidencing the indebtedness. Tr. 1417, 1428-1429. In addition, Oaks has structured the loan so that the actual maximum amount of the funds to be loaned by Mrs. Dawson to ECI are precisely equal to the exact dollar amount budgeted by ECI for its anticipated construction and first quarter-year operational expenses, without any additional "cushion". Tr. 1418, Tr. 1432-1433. By assuring that the maximum amount of Mrs. Dawson's loan to ECI exactly matched ECI's aggregate total of its anticipated construction and first quarter-year operational expenses, Oaks understood that, if Simmons went over budget and if she found it necessary to ask for additional funds from Salsa or Mrs. Dawson, he and Simmons would certainly have to "sit down and talk about it." Tr. 1433. In addition, Oaks has been advised by counsel that the laws in the State of Florida provide protections to non-voting shareholders, so that, if there is misuse or mismanagement of funds, the non-voting shareholders can institute litigation to exert "pressure to ... make some things happen." Tr. 1417-1418; Tr. 1427-1430.

107. In addition, in order to protect Mrs. Dawson's investment in ECI, Oaks will be requesting financial statements on the operation of ECI's station from Simmons, as well as other reports concerning the strengths, weaknesses and problems at the station, information as to market share gained or lost by the station in any given quarter, etc. Tr. 1418-1420. Furthermore, if the station is not performing well, Oaks expects Simmons to advise him *in advance* as to what corrective actions she intends to take. Tr. 1420-1421. Oaks realizes that Simmons has no past broadcast experience. Tr. 1422. However, he expects her to hire individuals at ECI's station who have experience in the field. Tr. 1423. Oaks feels that his role in ECI is not only to protect Mrs. Dawson's substantial financial investment, but also to help Simmons to become successful. Tr. 1423. Oaks would feel free to pick up the phone and call Simmons if he had a question about station operations, and he also feels free from time to time to go down to Florida to make a personal inspection of ECI's proposed station. Tr. 1425-1426. Oaks would also feel free, during such visits, to discuss the various phases of the station's operation and to meet with the station's staff. Tr. 1426. Oaks has personally contributed between $5 - $10,000 to Salsa and has no further financial responsibility to Salsa. Tr. 1436-1437.

Diversification

108. Evett L. Simmons owns no interests in any media of mass communications, other than her interest in ECI. ECI Ex. 2, p. 2.

109. Willie Martin, a former 10 percent non - voting stockholder in ECI, owns 51 percent of the stock of SE Broadcasting, Inc., licensee of Radio Station WBZS(AM), Eatonville, Florida. Tr. 1131-1132. SE Broadcasting, Inc., only has one class of stock, all of which is voting stock. Tr. 1133. Martin also formerly served as an officer and as a director of SE Broadcasting, Inc. Tr. 1133-1134. SE Broadcasting, Inc., acquired WBZS(AM) from its former licensee, WORL Radio, Inc., which, in turn, had acquired the station in October 1987. Tr. 1136. Martin also had owned 50.5 percent of the voting stock of WORL Radio, Inc., at the time that it was the licensee of Radio Station WBZS(AM). Tr. 1131-1132. In addition, Martin formerly served as President and as a director of WORL Radio, Inc. from October 1987 to either October 1988 or October 1989. Tr. 1136-1137. Additionally, Martin is the individual licensee of Radio Station WBZR(AM), Destin, Florida. Tr. 1137. Martin has been the licensee of WBZR(AM) for approximately four years. Tr. 1138.[10]

110. In addition, Martin owns 51 percent of the stock of Tallahassee Radio, Inc., permittee of Radio Station WTWF(AM), Woodville, Florida. Tr. 1138. All of the stock of Tallahassee Radio, Inc., is in the form of voting stock. (*Id.*). Martin also serves as President and as a Director of Tallahassee Radio, Inc., and has served in those capacities since 1987. Tr. 1139. Tallahassee Radio, Inc., became the permittee of WTWF in 1987. Tr. 1139. Martin is also the President, the Secretary, a Director, and sole voting shareholder of Dale Broadcasting, Inc., applicant for a construction permit for a new radio station in Ponte Vedra Beach, Florida. Tr. 1127-1128.

[10] The call letters of WBZR(AM) were formerly WWOU(AM). Tr. 1137.

111. William E. Summers, III, is the President, a Director and a stockholder of Ujima, Inc., which publishes a monthly magazine published in Louisville, Kentucky. Tr. 1220-1221. The name of the magazine is *Ujima*. (*Id.*). In addition, Summers is Chairman of the Board, an officer and an 80 percent stockholder of Omega Records. Tr. 1219. Omega Records is a corporation which produces and distributes recordings, records, tapes, and compact discs. Tr. 1219. The records produced and distributed by Omega Records are distributed throughout the United States, including the State of Florida. Tr. 1220. Summers also owns 80 percent of the equity in Dale Broadcasting, Inc., applicant for a construction permit for a new FM radio station in Ponte Vedra Beach, Florida. Tr. 1129.

Integration

112. Simmons proposes to be employed at ECI's contemplated radio station in Port St. Lucie, Florida, as the General Manager of the station on a full-time basis (40 hours per week or more). ECI Ex. 2, p. 1. As General Manager of the station, Simmons proposes to have overall responsibility for the day-to-day operation of ECI's proposed station. (*Id.*) Nonetheless, Simmons intends to hire a station manager in the future. Tr. 727. When asked during her August 30, 1991 deposition in this case what the station manager's job would entail, Simmons testified that she thought he was someone who manages the station. Tr. 729. At hearing, she testified that what she had in mind was an office manager who handles administrative details. Further, she first realized on the day before she testified at the hearing that a station manager was not the same as an office manager. Tr. 729-732.

113. Simmons is presently a partner in the law firm of Simmons, Fisher and Solomon in Port St. Lucie, Florida. ECI Ex. 2, p. 1. Simmons has proposed that, in the event that ECI is the successful applicant in this proceeding, prior to the issuance of Program Test Authority to ECI by the Commission, she will eliminate all of her active involvement with her law firm and will revert to an "Of Counsel" status with the firm. (*Id.*). Simmons proposes to turn over her case load to her partners and to any other attorneys that are then affiliated with her law firm. (*Id.*). Simmons proposes to remain available to the firm for consultation on an occasional basis in connection with matters on which she may be involved at the time that she effects her integration pledge. (*Id.* at pp. 1-2). Simmons estimates that, initially, this consultation will require fewer than five (5) hours per week and less time as the matters in which she had been involved are concluded. (*Id.* at 2). Simmons proposes that this consultation time will involve exclusively evening and weekend hours. (*Id.*). Simmons proposes that this consultation agreement will continue for no more than six months. (*Id.*).

114. Simmons' law firm was formed in January 1991. Tr. 736. Simmons is the Managing General Partner of her law firm as well as its founding partner. Tr. 989. Simmons devotes approximately 40 to 50 hours per week to the business of the law firm. Tr. 733. Simmons holds a 50% equity interest in her law firm. Tr. 1096. Simmons intends to retain her equity interest in the firm even if ECI is the successful applicant. Tr. 989-990.[11]

115. Simmons first advised her partners in May 1991 that she was involved in the ECI application. Tr. 737-738. She told them if she was successful, she would leave the firm and another partner would have to take over as managing partner. Tr. 738. However, Simmons has not discussed with her partners her intention to serve in an "Of Counsel" status. Tr. 983-984, 1098.

116. Simmons, who is Black, has resided in Port St. Lucie, Florida since January 1987. ECI Ex. 2, p. 2. From January 1987 through October 1989 she lived at 1528 Southeast Royal Green Circle, No. M-203 in Port St. Lucie. From October 1989 until June 1991 she lived at 211 Southeast Village Drive in Port St. Lucie, Florida. (*Id.*). From June 1991 to the present she has resided at 2061 S.E. Erwin Street in Port St. Lucie. Simmons proposes to continue to reside in Port St. Lucie, Florida. (*Id.*).

117. Simmons claims credit for participation in civic activities within the service area of ECI's proposed station. More specifically, Simmons has been a member of the Civil Service Appeals Board of the City of Port St. Lucie, Florida, since July 1988. ECI Ex. 2, Attachment I. Simmons has been a member of the Port St. Lucie, Florida Chamber of Commerce since June 9, 1988 and has served on its Economic Development Committee. (*Id.*). Simmons served as a Member of the Board of Directors of Florida Rural Legal Services from January 1990 through August 1991. (*Id.*). That organization provides legal aid in central Florida, including the service area of ECI's proposed station. (*Id.*). Simmons has been a member of the Board of Directors of the St. Lucie County Council on Aging since the summer of 1990. (*Id;* Tr. 741-742). Simmons has been a member of the Rotary Club of Ft. Pierce-Sunrise, Florida since July 1989. ECI Ex. 2, Attachment I. She has been Chair of the Committee For Vocational Services of the Rotary Club of Ft. Pierce-Sunrise, Florida, since July 1990.

---

[11] Subsequent to the luncheon recess in Simmons' testimony in this proceeding on December 12, 1991, Simmons changed her testimony to state that she no longer intended to retain her equity interest in her law firm if ECI is the successful applicant in this proceeding. Tr. 1085. Moreover, during redirect examination after the luncheon recess on December 12, 1991, Simmons testified that, during the recess, she had telephoned her law partners to ask them whether they had any objection to her becoming Of Counsel to the law firm if ECI is the successful applicant, since Simmons had not previously discussed the issue with her partners prior to that telephone conversation. Tr. 1098. Simmons testified that, during the telephone conversation with her partners, her partners stated that they had no objections to her becoming Of Counsel under such circumstances. (*Id.*). Simmons also testified that, during the telephone conversation with her partners on December 12, 1991, she asked them whether they would be willing to purchase her interest in her law firm, and, according to Simmons, one of her partners expressed interest in exploring the matter if an appropriate structure and documentation of the transaction could be mutually agreed to. Tr. 1098. Since neither ECI's *Statement of Integration and Diversification* filed May 13, 1991 nor ECI's direct case exhibits contain any representation that Simmons intends to dispose of her equity interest in her law firm if ECI is the successful applicant herein, and particularly since Simmons testified unequivocally, prior to her telephone conversation with her partners on December 12, 1991, that she intended to retain her 50 percent equity interest in her law firm, the latter testimony governs the Presiding Judge's findings in this case. All other testimony by Simmons to the contrary, constitutes an impermissible upgrading and is stricken and will be disregarded.

Tr. 742. Simmons has been a member of the First United Methodist Church of Port St. Lucie, Florida since 1987. She has served as a member of the Board of Trustees of that church since January 1989, and has served as Chair of the Board of Trustees of the church in 1990. ECI Ex. 2, Attachment I. Simmons is presently Chair of the Building Committee of the church and was Secretary of the church in 1989 and in 1991. (*Id.*). Simmons has been a member of the Ft. Pierce Alumnae of Delta Theta Sorority since April 1989 and has been a member of the By-Laws committee of that Sorority since 1990. (*Id.*). Simmons has been a member of the St. Lucie County Chapter of the NAACP since 1990. (*Id.*).

Auxiliary Power

118. ECI proposes to install auxiliary power equipment at the studio of its proposed station and at the transmitter site of its proposed station to ensure continuity of broadcast operations during any power failures. ECI Ex. 3, p. 1.

Banks Investment Company
Structure and Ownership

119. Banks Investment Company is a sole proprietorship of Frank J. Banks (Banks), an African American born in 1941. Banks Ex. 1. Banks, a Certified Public Accountant, is a resident of Memphis, Tennessee. Banks Ex. 2, p. 1; Tr. 1494. He is the president and 1/3 owner of Secured Capital Developers, which manages Community Development Corporations (CDC's) and other Minority Enterprise Small Business Investment Companies (MESBIC's). (*Id.*). Banks is also general partner and approximately 14% partner in Third and Madison Company, a real estate investment partnership which owns two office buildings. (*Id.*). Banks and his wife own or have ownership interests in several residences in Memphis, to management of which Banks devotes about two hours a month. Tr. 1529-1530.[12]

Diversification

120. Neither Banks Investment Company nor Frank J. Banks has any interest in any medium of mass communication. Banks Ex. 3.

Integration

121. In the event of a grant, Frank Banks will relinquish all other employment, including any active role he may then have with respect to any of his investments, and move to Port St. Lucie to work full time, at least 40 hours per week, as General Manager of the station. Banks Ex. 2, p. 1. Banks will formulate all station policy, oversee all station operations, supervise all station personnel through his management staff, do all hiring and firing, serve as the station's most senior community liaison and be responsible for administration and implementation of the station's EEO policy. (*Id.*; Tr. 1548). The Station Manager will essentially operate as his assistant. Tr. 1545-1547. Banks also plans to host a once or twice weekly talk show. Tr. 1545.

122. In the event of a grant, Banks will terminate his involvement with Secured Capital Developers, selling his interest to his partners, and resign as managing partner of his Third and Madison real estate partnership, a two hour a month job which essentially involves "paying the bills and collecting the rent and calling the plumber" and which Banks performs now because his office is in one of the two buildings owned by Third and Madison Company. Banks Ex. 2, p. 1-2; Tr. 1552-1553, 1555. He would probably retain his investment interest in that entity. Tr. 1554.

Auxiliary Power

123. Banks Investment Company proposes auxiliary power at the transmitter and the studio to prevent service interruption in the event of power loss. Banks Ex. 4.

Financial Qualifications/False Financial Certification
Issues Against Banks

124. By his signature dated October 17, 1989, Frank J. Banks certified that Banks, the company of which he is the sole owner, had sufficient net liquid assets from a committed source to construct and operate its proposed Port St. Lucie FM station for three months without revenue. Carrus Ex. 10, p. 2, 4. In its application, Banks projected its total costs as $300,000 and listed Sun-Delta Capital Access Center, Inc. (Sun-Delta) of Greenville, Mississippi, as its source of $300,000 in funds, with Howard Boutte, Jr., President of Sun-Delta, as its contact there. (*Id.* at 2).[13] Banks relied solely on Sun-Delta, and not on Banks' personal finances, for its funds. Tr. 1655-1656.

125. Prior to Banks' first deposition in this proceeding on September 4, 1991 (his "initial deposition"), Banks exchanged with the other parties a copy of a handwritten budget showing aggregate construction and three months operation costs of $298,776 for FM Channel 267 (101.2 MHz) at Port St. Lucie, which was only $1,224 less than the $300,000 cost projection in the application. Carrus Ex. 9, pp. 3-4; Banks Ex. 5, pp. 5-6. The handwritten budget itemized $74,330 in three months' operation costs. Banks Ex. 5, pp. 5-6. The handwritten budget also listed a single figure, $174,796, as "equipment cost" and showed other start-up costs totalling $49,650. (*Id.* at 5). Banks also exchanged at that time a typewritten, itemized list of equipment costs from Carl T. Jones Corporation, dated September 25, 1989, and totalling $174,796, the same "equipment cost" amount listed in the handwritten budget. (*Id.* at 1-4). These budgetary documents were produced by Banks in response to a production order requiring production of "all bank letters and other financing documents."

---

[12] As reported in Exhibit 1 to his application (Carrus Ex. 5, p. 5), at the time of filing, Frank Banks was a 10% partner and officer of New South Media Company, applicant for television Channel 13 in Memphis, Tennessee, in connection with which he had made a full time integration pledge. Tr. 1495-1496; Carrus Ex. 2. However, a settlement agreement (Carrus Ex. 3) seeking dismissal with prejudice of the New South application was filed in that case on July 21, 1989, prior to the filing of the present application. The settlement was approved and the New South application dismissed with prejudice in a *Memorandum Opinion and Order* (Carrus Ex. 4) released February 2, 1990, prior to the February 8, 1990 B cutoff date herein. Tr. 1515, 1520.

[13] Sun-Delta is a venture capital company which qualifies as a Minority Economic Small Business Investment Corporation (MESBIC). Tr. 1532, 1533-1534, 1536.

Tr. 1780. At the prehearing conference in this proceeding, the Presiding Judge made clear that all parties were to produce their budgets, with dollar amounts showing. *Id.*

126. At his initial deposition, Banks characterized the handwritten budget as the "seed start-up" budget which was the basis for the $300,000 total cost projection in the application. Carrus Ex. 9, pp. 3-4. He explained that the operational cost estimates in the handwritten budget were "pretty much based on [his] understanding of the radio station". (*Id.* at 4-5). Although asked numerous questions about items in the handwritten budget, he made no attempt to claim that it had been revised prior to Banks' filing its application or that it was not the budget on which Banks was relying. Carrus Ex. 9. The only mention of a possible reduction in any portion of the budget was Banks' testimony that he "probably" would put his salespersons on a straight commission, for a salary savings of $2,500 per month. (*Id.* at 14-15. When specifically asked at the September 4, 1991 deposition about his salary as general manager, Banks confirmed that his monthly salary as General Manager would be $2,950 the salary shown in his handwritten budget. (*Id.* at 7, 17). However, as discussed, *infra*, (see findings 129-131) Banks later claimed that he had mentally eliminated the general manager's salary, as well as other expense items, in October 1989.

127. Banks was also asked at his initial deposition about the clause in the October 9, 1989 financing letter from Sun-Delta for $300,000 which read, "at present we would intend to calculate interest at twelve percent (12%) with a stock warrant interest of up to 30%." Carrus Ex. 8, p. 1 and Carrus Ex. 9, p. 10. In response to questions about the stock warrant interest, Banks testified that he "was going to negotiate that they wouldn't buy anything at 30%. I didn't plan on giving them anything." (*Id.* at 11). He reiterated that "it was not my intention to let them have any percentage, not the 30%," and in response to a hypothetical question about whether he could form a corporation and provide up to 30% of its equity to Sun-Delta, he answered: "I could, but I wouldn't. I have no interest in having a partner." (*Id.* at 12).[14]

128. In a Motion to Enlarge Issues filed against Banks on October 11, 1991, Carrus pointed out that Banks' cost estimates were significantly understated in several respects. Nowhere in its handwritten budget, for example, had Banks listed the $4,166.66 *per month* in transmitter site rent which it would owe under the site availability letter of intent it was relying on, even though that rent was established prior to Banks' financial certification. *See* Carrus Ex. 11; Tr. 1676. Banks listed *total* transmitter and studio rent expense of $2,400 (start-up, plus three months) in the handwritten budget, thereby understating its actual projected transmitter site rental by $10,000, without even taking studio rent into account. Banks also failed to include any amounts for debt service, even though the Sun-Delta letter called for interest payments during the first three years of the loan (maximum of $9,000 during the first three months, at 12 percent), with no provision for an interest payment moratorium. See Tr. 1637, 1758-1759. Carrus also argued that because Banks was unwilling to provide Sun-Delta with *any* stock warrant interest, Banks' reliance on the Sun-Delta letter, which *required* a stock warrant interest of up to 30 percent, was improper.

129. In a December 16 Statement Under Penalty of Perjury submitted with Banks' Opposition to Carrus' Motion to Enlarge, Banks claimed for the first time, that when he learned about the $4,166.66 monthly transmitter site rental expense after completing the handwritten budget, he made the necessary "modifications mentally." Banks Ex. 9, p. 1. He itemized five separate modifications, claiming that he had eliminated the line items for: travel ($6,000), and advertising ($3,000), general manager's salary ($8,850), salespersons' salaries ($7,500), and salespersons' payroll taxes and fringes ($1,500), thereby freeing up funds for rental expense and debt service. (*Id.* at 1-2). Banks also submitted a second letter from Sun-Delta, dated December 10, 1991, which modified the initial letter to: specify that the stock warrants, if required, would be negotiable and would take the form of nonvoting stock; increase the loan amount to $325,000; and provide for a six-month moratorium on interest payment. See Banks Ex. 7.

130. More than two months after the Motion to Enlarge Issues was filed in October 1991, on an unspecified date after the hearings on the comparative issue in this proceeding were concluded in December 1991, Banks prepared a typewritten budget incorporating the mental budgetary adjustments he claimed to have made in October 1989. Banks Ex. 8; Tr. 1649-1650. This newly created typewritten budget, the handwritten budget, and the typewritten material from Carl T. Jones Corporation concerning equipment costs comprise Banks' only written budgetary material. Tr. 1672. At no time has Banks provided any notes contemporaneous with his alleged mental budget adjustments. Tr. 1709, 1711.

131. At hearing on the added financial issues, Banks claimed that he made all of the mental adjustments in his cost estimates when he first learned about the $4,166.66 monthly cost for his proposed transmitter site, before Banks filed its application. Tr. 1622-1623, 1687, 1688-1689.[15] He claimed that his recollection of the time of the mental adjustments was based on his seeing the transmitter site letter of interest (Carrus Ex. 11) at hearing and on "logic I normally followed." Tr. 1726. Banks also tried to claim at hearing that he had testified in his initial deposition about the mental budgetary adjustments. Tr. 1694-1695. But after being given full opportunity to review his entire initial deposition transcript, he could cite only the testimony about the possible reduction in salespersons' salaries. Tr. 1695-1706.

132. At hearing, Banks also testified that the $600 monthly figure in his handwritten budget was originally intended to encompass both studio and transmitter site rent ($300) each. Tr. 1679. When he later made the modification to include a separate monthly transmitter site rent of $4,166.66, however, he left in the original rental figure of

[14] At his second deposition in this proceeding, held on March 12, 1992, Banks was again asked whether he had been willing to provide the stock warrant of up to 30 percent at the time he received the October 1989 letter from Sun-Delta and he responded: "No, not really." Tr. 1749-1750.

[15] At his March 12, 1992 deposition concerning the financial issues, Banks had been more vague about the timing of the mental adjustments, testifying that he made the mental adjustments when someone, perhaps one of his opponents, had brought the shortfall problem to his attention. Tr. 1722-1723, 1725-1726.

$600. Tr. 1680; Banks Ex. 8. Asked to explain the continued use of the $600 figure, Banks first claimed that he had kept the studio rent the same, then changed that testimony to indicate that he had increased the studio rent to $600. Tr. 1680-1682. He could point to no basis other than "thin air" for this $300 per month increase, however, and conceded that he had not made a similar increase in any other budgetary line item. Tr. 1683-1684.

133. With respect to the $300 monthly electricity cost in his budget, Banks testified at hearing first that the estimate was, to the best of his recollection, based on his personal knowledge, but then admitted that he does not know what electricity would cost for a 6 kW station at Port St. Lucie, Florida. Tr. 1739-1740, 1743. Banks conceded that his budget had no line item for remodeling studio space. Tr. 1743. He also testified that he planned to have a 24-hour-a-day operation with, "at some point," a satellite service for a portion of the day, but he had not checked the cost of obtaining satellite programming and Banks' budget only showed projected costs for "music production," not satellite programming or programming in general. Tr. 1744-1745.

134. With respect to the stock warrant interest of "up to thirty percent" specified in the 1989 Sun-Delta financing letter, Banks testified at hearing that he would not have let Sun-Delta's insistence on a stock warrant interest "kill the deal." Tr. 1623-1624. However, he later conceded that nowhere during his initial deposition did he state that he would have given Sun-Delta the 30 percent stock warrant interest if he had no other choice. Tr. 1756. His only explanation for that failure was a claim that he had not been asked the right question. Tr. 1754-1756. He also claimed at hearing that Boutte had told him, shortly after he received the October 1989 letter, that the stock warrant interest was negotiable. Tr. 1626-1627, 1761-1762. He also testified that stock warrants in this kind of financing deal are always nonvoting and that he and Boutte discussed that the stock would be nonvoting. Tr. 1628. Banks did not know what overall rate of return Sun-Delta wanted from this deal. Tr. 1760. The negotiation process on the stock warrant interest has not yet begun. Tr. 1758.

135. Boutte testified that Sun-Delta was looking for a 30 percent overall return on its investment in Banks. Tr. 1785. That overall rate was to be earned through a combination of the twelve percent interest and the return on the stock warrants. *Id.* Sun-Delta's usual and customary practice is to obtain stock warrants and the receipt of stock warrants from Banks in some percentage was a requirement at the time of the first letter to Banks. Tr. 1790, 1791, 1831. Boutte could not recall a broadcast loan done by Sun-Delta without stock warrants. Tr. 1824. The stock warrant percentage could potentially go as high as 49 percent. Tr. 1786-1789. The actual stock warrant percentage would be set after an analysis of the risk involved in the Banks investment. Tr. 1790. Even after its second letter in December, 1991 stating that the stock warrants were negotiable, Sun-Delta would be less interested in the deal with Banks if it could not obtain stock warrants. Tr. 1798.

136. Boutte could recall no discussion of any consequence with Banks with respect to the terms and conditions of the October 1989 Sun-Delta letter after its issuance until a week or two before the December 1991 letter was issued. Tr. 1794-1796, 1834, 1837-1838. The second letter modified the first with respect to amount, interest repayment, and the nature of the stock warrant interests. (Compare Carrus Ex. 8 and Banks Ex. 7; Tr. 1803, 1807). At the time Sun-Delta issued the first letter, it was interested in obtaining either voting or nonvoting stock warrants from Banks. Tr. 1825. The negotiation over the stock warrants referenced in the second letter has not yet begun; that process has been left for the future. Tr. 1803. If no stock warrants are available, Sun-Delta will have to consider requiring additional collateral and "would probably be looking for a higher security position." Tr. 1836.

CONCLUSIONS

Financial Qualifications/False Financial Certification Issues Against Banks

137. The record establishes that the financial qualification issue must be resolved against Banks. Banks failed to demonstrate that prior to certifying his application, he had duly ascertained the actual costs of constructing and operating the station for three months. Also, Banks failed to demonstrate that funds were reasonably available to meet the costs.

138. In its application, Banks projected its total costs as $300,000 and listed Sun-Delta Capital Access Center, Inc. (Sun-Delta) of Greenville, Mississippi, as the sole source of $300,000 in funds. Prior to Banks' initial deposition on September 4, 1991, Banks exchanged with the other parties a copy of a handwritten budget showing aggregate construction and three months operation costs of $298,776, which was only $1,224 less than the $300,000 cost projection in the application.[16] At the September 1991 deposition, Banks confirmed that the handwritten budget was Banks' start-up budget which was the basis for the $300,000 total cost projection in the application. Although asked numerous questions about items in the handwritten budget, Banks made no attempt to claim that it had been revised prior to Banks' filing its application or that it was not the budget on which Banks was relying. To the contrary, Banks confirmed the amount of his own General Manager salary ($2,950 a month) as it was shown in the handwritten budget.

139. The record makes plain that Banks' cost estimates were significantly understated. Among other things, Banks failed to account for transmitter site rent and debt service.[17] Inclusion of these items alone places Banks' costs in excess of the $300,000 claimed in available funds. Banks asserts that the written budget did not accurately portray his cost estimates and that he had mentally modified his budget as long ago as October 1989. In this "mentally

[16] Banks and the other parties were required to produce financial documents including their budgets.

[17] The Sun-Delta letter dated October 9, 1989 states: "Any loan made will be repaid over a ten year period, interest only for the first three years with principal and interest payments beginning in the fourth year." (Carrus Ex. 8). Thus, Banks' claim that the Sun-Delta letter is "silent" with respect to the issue of whether there would be an interest payment moratorium is without basis.

adjusted" budget, five line item expenses, including the General Manager's salary which Banks acknowledged at his September 1991 deposition, disappeared entirely.

140. Banks' attempted defense is not believable and is rejected. Significantly, the defense was raised only after Carrus identified the deficiencies with Banks' handwritten budget. The handwritten budget, produced pursuant to the Presiding Judge's directive, does not indicate any revisions, mental or otherwise. Also, Banks did not produce a single document to corroborate the alleged "mental" adjustments. Similarly, as previously discussed, although given ample opportunity at his September 1991 deposition, Banks did not claim that cost items contained in the written budget had been modified. The overwhelming evidence supports the conclusion that Banks made his mental budgetary adjustments *after* Carrus brought the need for them to Banks attention. The alleged "mental" adjustments are clearly a *post hoc* defense intended to extricate Banks from the predicament arising from his deficient budget. Banks' failure to prove that his projected costs were meaningfully ascertained is, standing alone, grounds for denial of Banks' application. *Victorson Group, Inc.*, 6 FCC Rcd 1697, 1700 and cases cited therein (Rev. Bd. 1991).

141. A second ground for denying Banks' application is his failure to demonstrate the availability of funds to meet his required costs. As discussed, *supra*, Banks needs more than the $300,000 proposed to be provided by Sun-Delta. Moreover, the Sun-Delta loan can not be credited in light of Banks' unwillingness to meet the loan terms specified in the October 9, 1989 Sun-Delta letter.

142. The Sun-Delta letter dated October 9, 1989 explicitly provides for Sun-Delta to receive "a stock warrant interest of up to 30%." (Carrus Ex. 8). However, during his initial deposition, in September 1991, in response to a series of questions about the stock warrant requirement contained in the October 1989 financing letter, Banks repeatedly declared that he was *not* going to provide Sun-Delta with stock warrants in any percentage, much less 30 percent. Nowhere did he state that he *would* provide the warrants if left with no other choice.

143. For his part, Howard Boutte, President of Sun-Delta, made clear that at the time he wrote the October 1989 letter, stock warrants in some percentage were a requirement of the deal, in order for Sun-Delta to at least have a chance to achieve its 30 percent targeted rate of return. Boutte also testified that the obtaining of stock warrants, for voting or nonvoting stock, was a usual and customary business practice of Sun-Delta, particularly in broadcast deals. At hearing, Banks tried to explain away his deposition testimony about the stock warrants by claiming that he had not been asked a question requiring him to disclose that he would have provided the stock warrants as a last resort. As with the "mental adjustment" defense, the best evidence available -- the initial deposition testimony -- demonstrates persuasively that Banks had no intention of providing the necessary stock warrants. There was, accordingly, no willingness on Banks' part to meet the loan terms set out in the Sun-Delta letter. Without such willingness, Banks could not rely on Sun-Delta as his source of funds. *See Scioto Broadcasters* 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990) (subsequent history and citations omitted) (in order to have "reasonable assurance" the applicant must demonstrate "that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (e.g., payment period, interest rate, collateral requirements, and other basic terms). . . . In other words, central to any successful 'reasonable assurance' showing of a loan from a financial institution is that [among other things] the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.").[18]

144. For all of the above reasons, Banks was financially unqualified at the time of certification. It is, therefore, unnecessary to reach the more subjective question of whether Banks knowingly intended to deceive the Commission when he certified that Banks was financially qualified. *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3199 (Rev. Bd. 1990); *Janice Faye Surber*, 5 FCC Rcd 6155, 6159 (Rev. Bd. 1990).

Comparative Evaluation
Integration

145. Carrus is entitled to part-time integration credit for his proposal to work 25 hours a week at the Port St. Lucie station. In this regard, taking into consideration Carrus' commitment to work 40 hours a week at a new FM station in Jupiter, Florida,[19] Carrus has met the burden of establishing how he would meet both commitments. Banks argues that Carrus should be denied integration credit because of his alleged lack of involvement in the preparation and prosecution of his application. Also, Banks contends that Carrus' father is the real party in interest in control of the Carrus application.[20] Both contentions find no support in the record. The record evidence demonstrates that Carrus, with the assistance of his attorney, has been involved in and in control of the application process. Moreover, the limited parental involvement revealed in the record is permissible under pertinent Commission precedent. See *High Siera Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983). Carrus receives the part time credit requested. Carrus is not entitled to qualitative enhancement.

146. HBC is entitled to 100% full-time integration credit for Helen B. Horton's proposal to work full-time as general manager of the proposed station. The record makes clear that HBC's ownership structure is *bona fide*. HBC's non voting stockholder, Vernon Smith, has been properly insulated since the adoption of the applicant's bi-furcated ownership structure. Smith's pre-formation activities have been extremely limited; the record is devoid of any evidence of Smith's participation in post-formation activities. The record evidence is clear that Horton is the dominant, moving force behind HBC.

147. ECI, Carrus and Banks urge that HBC should be denied any integration credit and, at the most, HBC should receive 20% integration credit to reflect Horton's 20% equity interest. HBC's opponents posit this contention on Smith's alleged impermissible dominance and non-passiv-

[18] The December 1991 Sun-Delta letter which substantially modified the terms of the October 1989 letter does nothing to salvage Banks' financial qualifications at the application filing stage. See *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991). It is therefore not necessary to reach Carrus' argument that Banks has not established his current financial qualifications.

[19] As reflected in the Findings, at the time exhibits were exchanged in this case Carrus' Jupiter application was pending. The fact that it was subsequently dismissed does not moot the need to consider the Jupiter commitment.

[20] Banks did not seek a real party in interest issue against Carrus.

ity. These claims are entirely devoid of substantive merit. As reflected in the record, Smith's pre-formation activities consisted of providing Horton with the names of several communications attorneys and generally discussing with Horton different banks in the area that were available as possible financing sources for the HBC venture. As also reflected in the record, Smith has maintained an entirely passive role since the formation of HBC and there is no evidence indicating his role will change in the future.

148. Conversely, as detailed in the findings, Horton has been intimately involved and in control of every aspect of the preparation and prosecution of the HBC application. Among other things, Horton selected and retained counsel to represent HBC; personally retained the services of HBC's consulting engineer; personally contacted the transmitter site owner; retained HBC's site location specialist; in consultation with counsel, determined the structure of the corporation and the corporation's equity division and developed a staffing and three months operating budget; and secured the initial letter of financing as well as the substitute bank letter at a different bank. In addition, Horton has a substantial financial stake in the applicant. Through the date of her testimony in this proceeding, Horton had personally invested over $35,000 in HBC. In addition, as a guarantor of the proposed loan by First National Banks to HBC, she is jointly and severally liable for repayment of the debt.[21]

149. The Commission has made clear that the post-formation record is ordinarily the best evidence of who will control the ongoing licensee. Pre-formation activities are probative only if the post-formation is inconclusive. *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 (1992). Here, Smith's pre-formation activities have been *de minimis* and Smith's post-formation activities, are non existent. The record conclusively demonstrates, in accordance with her formal status as HBC's sole voting stockholder, Horton will exercise exclusive control over the applicant. Further, Smith is and will continue to be a "passive" participant.

150. Horton is currently the owner of a real estate brokerage company. In the event of a grant of HBC's application, Horton will no longer work at the realty company. Also, she will relinquish her status as the real estate broker of record and turn this position over to her son who is currently employed full-time as the Broker-Manager of the corporation. Horton is currently the sole stockholder of the corporation but would retain no more than a 10% stock interest if HBC's application is granted. HBC has made a specific and credible showing how Horton's proposed integration will be effectuated. In the absence of any evidence that the commitment can not be met, it deserves to be fully credited. *Bradley, Hand and Triplett*, 89 FCC 2d 657, 659-661 (Rev. Bd. 1982).

151. HBC receives significant qualitative enhancement. HBC receives substantial minority credit for Horton's participation. Also, HBC receives moderate to substantial local residence-civic participation enhancement.[22] Horton has resided in Port St. Lucie from March 1, 1980 to the present and in that time period she has been involved in numerous local civic and community activities, serving in leadership capacities.

152. ECI seeks 100% quantitative credit. However, the record persuades that ECI is not entitled to any integration credit. The facts in this case bear a striking resemblance to other integration proposals deemed unworthy of credence. See *Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991) and cases cited therein.

153. Summers and Martin, the two individuals who were originally the purportedly passive (non-voting) principals of ECI and who held an aggregate 80% of ECI's equity, were the prime moving forces and dominant principals in ECI. Summers and Martin are veteran broadcasters and have known one another for the past thirty years. Both have utilized the law firm of Pepper & Corazzini for decades. In past, Summers and Pepper have been in business together as partners in the ownership of radio stations. As in Fresno FM, Simmons became the voting stockholder in a relatively casual way. Simmons was accepted as the "controlling" principal without any investigation whatsoever of her character, business and financial qualifications.

154. In addition, Summers decided and dictated the structure of the entity and determined the equity distribution without any input from Simmons. Also, Summers decided that Simmons' only financial obligation would be the payment of $200 for stock in ECI and all other financial obligations in connection with ECI would be borne solely by Summers. Additionally, Summers, acting completely on his own, procured the Bank of Louisville letter on which ECI is relying on for its source of funds. Summers has had a banking relationship with the bank for the past 50 years. In this connection, Summers decided on his own, without any input from Simmons, that the loan amount should include a "cushion" of $19,000. Summers also directed Simmons to contact Pepper and Corazzini, who ultimately came to act as communications counsel for ECI. Summers felt justified in directing Simmons to use the services of Pepper and his firm because "it was a part of my business since I was going to be the investor." (Tr. 1247). Moreover, if Summers wants to find out anything about the Port St. Lucie proceeding, he feels free to call Pepper & Corazzini because the individuals in the firm are his attorneys. In this connection, when Summers decided to dispose of his interest in ECI, he advised Pepper, not Simmons. In fact, he never spoke to Simmons about the disposition of his stock interest in ECI to Salsa. Martin, the other purported "passive" principal, prepared ECI's budget including staffing, salaries for each of the staff positions, and other anticipated first quarter-year operational expenses. In contrast to the efforts undertaken on behalf of ECI by Summers and Martin, Simmons' contributions are negligible. They appear to consist primarily of her signing the application prepared for her by Pepper & Corazzini.

---

[21] Another indicia of *bona fides* of a two-tiered corporate applicant is whether the passive non-voting shareholder has conducted an inquiry of the background of the proposed voting shareholder who will be in control of the venture. See *Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374, 3376 (Rev. Bd. 1990), *aff'd*, 6 FCC Rcd 2497, 2498 (1991). Here the uncontradicted record evidence makes clear that Smith carefully scrutinized Horton's background before deciding to become a non-voting stockholder and entrusting Horton with complete control of the venture.

[22] Civic activities are to be considered with local residence as a unified factor. *Ronald Sorenson*, 6 FCC Rcd 1952, 1952-1953 (1991).

155. In sum, the totality of record (pre and post-formation) cast serious doubt on the validity of ECI's proposal. Plainly, ECI has failed to meet its burden of demonstrating that the nominally active principal in ECI, Simmons, will exercise exclusive control over ECI and its proposed station. All integration credit is denied.

156. Further, the departure of Summers and Martin from ECI does not salvage ECI's integration proposal. As a preliminary matter, the substitution of Salsa for Summers and Martin as a non-voting stockholder in ECI cannot properly be used as the basis for curing ECI's defective integration proposal, based upon the well-established prohibition against comparative upgrading after the deadline for filing amendments as of right. *See generally Daytona Broadcasting Company, Inc.*, 97 FCC 2d 212 (Rev. Bd. 1984). *See also Revision of FCC Form 301*, 4 FCC Rcd 3853, 3860-3861, 3868 n.81 (1989); *WWOR-TV, Inc.*, 6 FCC Rcd 6569, 69 RR 2d 1617, 1620 n.13 (1991). Moreover, the substitution of Salsa for Summers and Martin took place under circumstances which, in and of themselves, demonstrate that ECI's integration proposal is inherently unreliable.

157. As was the case in Summers' willingness to "give away the store" to Simmons, a total stranger to him, without having conducted any "due diligence" scrutiny of her character, business record and acumen, financial responsibilities, etc., so, too, neither Hilda Dawson nor Jose Oaks conducted any similar "due diligence" or investigation of Simmons before Mrs. Dawson made the commitment to loan to ECI the sum of $408,211. Indeed, prior to the week of hearings in this proceeding during the week of December 13, 1991, Mrs. Dawson had never met Simmons and had never spoken with her. It is inherently incredible that Mrs. Dawson would give away total control, and commit to loan $408,211 to an individual totally unknown to her. To the contrary, the record evidence establishes that Jose Oaks, acting to protect Mrs. Dawson's substantial financial investment in ECI, has structured the investment in such a way as to keep tight control over ECI and its finances. For example, to protect Mrs. Dawson's substantial investment, Oaks has structured the investment in the form of a loan to ECI, rather than as an equity contribution from Mrs. Dawson. Moreover, Oaks has structured the transaction to be a secured loan -- secured, not only by all of the station's assets, but also by the personal guarantee of Evett Simmons on the promissory note evidencing the indebtedness. Significantly, Oaks has structured the loan so that the actual maximum amount of the funds to be loaned by Mrs. Dawson to ECI is not one penny greater than the exact dollar amount budgeted by ECI for its anticipated construction and first quarter-year operational expenses, without any additional "cushion" whatsoever for any unanticipated expenses.

158. Moreover, the record evidence is clear that Oaks will not be content simply to rely on the rigorous financial leverage that he and Mrs. Dawson will be able to wield against Simmons. Oaks testified that, in order to protect Dawson's investment in ECI, he will be requesting financial statements on the operation of ECI's station from Simmons, as well as other reports concerning the strengths, weaknesses and problems at the station, information as to market share gained or lost by the station in any given quarter, etc. Furthermore, if the station is not performing well, Oaks expects Simmons to advise him *in advance* as to what corrective actions she intends to take. Oaks feels that his role in ECI is not only to protect Mrs. Dawson's substantial financial investment, but also to help Simmons to become successful. Oaks would feel free to pick up the phone and call Simmons if he had a question about station operations, and he also feels free from time to time to go down to Florida to make a personal inspection of ECI's proposed station. Oaks would also feel free, during such visits, to discuss the various phases of the station's operation and to meet with the station's staff. Simply stated, these facts make it evident that Oaks on behalf of Mrs. Dawson intends to be actively involved in ECI's station in a manner inconsistent with the passivity required of a purportedly passive "non-voting" shareholder in an applicant corporation. This is hardly surprising, given the fact that, in previous instances where Oaks and Hilda Dawson have been involved in broadcast ventures, Oaks has always been a voting shareholder or a general partner. Clearly, *assuming, arguendo*, the substitution of Salsa could be validly considered, ECI's integration proposal remains suspect and no credit is warranted.

159. Moreover, even assuming ECI's organizational structure passed muster, ECI has failed to demonstrate entitlement to integration credit. ECI has not met its burden of showing that Simmons will be able to effectuate her full-time integration proposal. Simmons is the Managing General Partner of a law firm, formed in January 1991 and holds a 50% equity interest in the law firm. She devotes approximately 40 to 50 hours to the practice. In the event of a grant, Simmons asserts she will turn over her caseload to her partners. However, she will still be available for consultation which she estimates will require fewer than 5 hours a week. Also, she will retain her equity interest. Simmons first advised her partners in May 1991 of her involvement in ECI and the need, if she was successful, for someone else to take over as managing partner. Simmons has not discussed with her partners her intention to serve in an "Of Counsel" status.

160. ECI has failed to provide specific and credible evidence of Simmons' time commitment and how she will accommodate her law practice with her integration proposal. Simmons has not provided a specific and detailed accounting of her present duties and of the time she presently spends in her capacity as Managing General Partner and as a full-time practicing attorney of the firm. Also, she has not identified the individuals who will take over her managing responsibilities as well as her caseload. Moreover, Simmons' retention of her 50% equity interest appears to be incompatible with her claimed occasional consultation. Also, her claim that her occasional consultations will cease in six months appears to be at odds with her assuming an "of counsel" status. In this connection, Simmons has not discussed her serving in an "of counsel" status with the partners in her law firm. Further, the record does not delineate what services she will perform in that capacity and her time commitment. For all of the foregoing reasons, ECI receives no quantitative integration credit.[23]

---

[23] Assuming qualitative enhancement was awarded, ECI's enhancement consisting of 100% minority credit, short term (since 1987) local residence and civic participation, most of which occurred after ECI filed its application, is inferior to

161. Assuming Banks was not disqualified, Banks would receive 100% quantitative integration credit. Banks will serve as full-time general manager. In addition, Banks proposes to relinquish all other employment and business activities and move to Port St. Lucie. His retention of real estate investments will not affect his ability to effectuate his integration proposal. Banks is qualitatively enhanced by his proposed local residence and minority status.[24]

Diversification

162. Carrus, Banks and HBC have no media interests. Because Summers and Martin have not been passive principals, their respective mass communications media interests are attributed to ECI for diversification purposes. Based on these attributable other media interests, ECI is assessed a substantial diversification demerit.

Auxiliary Power

163. All the applicants proposed auxiliary power. All receive the slight credit accorded such purposes and are equal under this criterion.

Comparative Summary

164. HBC is the clear comparative winner. Banks is financially unqualified. ECI receives no integration credit and suffers a substantial diversification demerit. As between HBC and Carrus, HBC's qualitative enhancement is far superior. HBC's application is granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[25] the application of Horton Broadcasting Company, Inc. for a construction permit for a new FM station on Channel 267A in Port St. Lucie, Florida IS GRANTED; and the applications of Richard M. Carrus, Evett Communications, Inc., and Frank J. Banks d/b/a Banks Investment Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

HBC's qualitative enhancement.

[24] Banks' qualitative enhancement is inferior to HBC.

[25] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-33

In re Applications of

CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC.
Channel 202C3
Union Park, Florida
File No. BPED-881207MA

HISPANIC BROADCAST SYSTEM, INC.
Channel 202C3
Lake Mary, Florida
File No. BPED-891128ME

For Construction Permit for New, Noncommercial Educational FM Station

Appearances

Joseph E. Dunne, III, on behalf of Central Florida Educational Foundation, Inc.; *James L. Oyster*, on behalf of Hispanic Broadcast System, Inc.; and *James W. Shook*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: January 13, 1993; Released: January 26, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Member BLUMENTHAL:

1. The Review Board has before it (1) an *Initial Decision*, 7 FCC Rcd 6010 (1992), by Administrative Law Judge Edward J. Kuhlmann (ALJ) granting the Construction Permit application of Central Florida Educational Foundation, Inc. (Central) for a new noncommercial educational FM station at Union Park, Florida and denying the mutually exclusive application of Hispanic Broadcast System, Inc. (Hispanic); (2) exceptions and reply briefs filed by the parties; (3) a petition for leave to amend, sever and grant, filed by Hispanic;[1] and (4) comments by the Bureau and Central.

2. Hispanic's petition and accompanying amendment seek to eliminate the mutual exclusivity between Hispanic and Central and thus permit a grant of both applications. The amendment proposes to modify Hispanic's engineering proposal, specifying a different community of license, channel, class, effective radiated power, and antenna location. In comments supporting Hispanic's petition, the Bureau states that it has reviewed the amendment and determined that it conforms with the Commission's technical rules, would eliminate the mutual exclusivity between the applications, and would allow both Central and Hispanic to provide new noncommercial educational broadcast services to the Orlando, Florida area. In the absence of any basic qualifying issues, we find that acceptance of the amendment serves the public interest by terminating this comparative proceeding and expediting the provision of two new noncommercial services. *See Las Americas Communications, Inc.*, 6 FCC Rcd 1634, 1637 ¶ 25 (1990)(equities favor acceptance of post-designation amendment that permits immediate grant of pending application).

3. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, sever and grant, filed by Hispanic Broadcast System, Inc. on December 21, 1992, IS GRANTED, and the accompanying amendment IS ACCEPTED; that the exceptions and replies ARE DISMISSED; and that the applications of Central Florida Educational Foundation, Inc. (File No. BPED-881207MA) for noncommercial educational FM Channel 202C, at Union Park, Florida, and Hispanic Broadcast System, Inc. (File No. BPED-891128ME) for noncommercial educational FM Channel 206A, at Kissimmee, Florida ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[1] The petition bears a November 30, 1992 Commission mailroom stamp, but was stamped in by the Office of the Secretary, Federal Communications, on December 21, 1992. Central filed its comments in support on December 4, 1992, and the Bureau's comments were filed on December 8, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-501

In re Applications of

KATE F. THOMAS	File No. BPH-890424MC
TIMOTHY Z. BARBER d/b/a DOUBLE B BROADCASTING	File No. BPH-890424MD
MARY L. HOOPER and CAROLYN B. TINSLEY	File No. BPH-890424ME
LADY BUG BROADCASTING COMPANY, INC.	File No. BPH-890424MF

For Construction Permit for a
New FM Station on Channel 281C2,
Union, Mississippi

ORDER

Adopted: January 15, 1993; Released: January 29, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member Blumenthal:

1. The *Initial Decision* of Administrative Law Judge Arthur I. Steinberg, 7 FCC Rcd 5141 (1992), in the above-captioned proceeding was released on August 14, 1992. Applicant Mary L. Hooper and Carolyn B. Tinsley has failed to file exceptions to this decision. Thus, pursuant to §1.276(f) of the Commission's rules, 47 CFR 1.276(f), its application will be dismissed for failure to prosecute.

2. ACCORDINGLY, IT IS ORDERED, That the application of Mary L. Hooper and Carolyn B. Tinsley (File No. BPH-890424ME) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BELLEVUE INDEPENDENT SCHOOL DISTRICT
Bowie, TX — File No. BPLIF-911008DT

LINDSAY INDEPENDENT SCHOOL DISTRICT
Rosston, TX — File No. BPLIF-910603DC

THACKERVILLE INDEPENDENT SCHOOL DISTRICT
St. Jo, TX — File No. BPLIF-911008DE

For License and Construction Permit
in the Instructional
Television Fixed Service on
Channels D1, D2, D3, and D4

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1993; Released: January 27, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Bellevue Independent School District ("Bellevue"), Lindsay Independent School District ("Lindsay"), and Thackerville Independent School District ("Thackerville"), each seeking a license in the Instructional Television Fixed Service (ITFS) on channels D1-D4 in Bowie, Rosston, and St. Jo, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Bellevue, Lindsay, and Thackerville. All three applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students: Bellevue and Lindsay are accredited by the Texas Education Agency, and Thackerville is accredited by the Oklahoma State Department of Education. Although they all propose to serve students outside their districts, because they also propose to provide some formal educational programming to schools within their own districts, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72; 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Bellevue, Lindsay, and Thackerville are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency or the Oklahoma State Department of Education, is entitled to three points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications, for additional ITFS channels in the Bowie, Rosston, or St. Jo area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant.

---

[1] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Bellevue's illustrative schedule proposes an average of 20 hours of ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Section V, Question IV of the application, we will consider the programming on Bellevue's schedule as non-formal for the purpose of determining merit points *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, its programming grid proposes an average of 20 hours of formal educational programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Bellevue is entitled to no programming merit points.

The illustrative schedule for Lindsay proposes an average of 24.375 hours of ITFS programming per channel per week; however, the schedule does not indicate which programs are formal educational. Accordingly, we will consider the programming on Lindsay's schedule as nonformal. *Valley View Independent School District, supra.* In contrast, its programming grid proposes an average of 4 hours of formal educational programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Lindsay is entitled to no programming merit points.

Thackerville's illustrative schedule proposes an average of 16.75 hours of formal programming per channel per week, as does its programming grid. Like its educational competitors, the amount of programming proposed by this applicant does not reach the threshold at which merit points are awarded. Accordingly, Thackerville is entitled to no programming merit points.

E- and F- Channel Group Relocations. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels; therefore, none is entitled to the one point for such applicants.

Total. Bellevue, Lindsay, and Thackerville are each entitled to a total of nine points: four points for being local, three points for being accredited, and two points for observing the four-channel limitation. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989), *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990), and Section 74.913(d) of the Commission's Rules. This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license. Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches fewer than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the three applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Although Lindsay and Thackerville included with their enrollment figures letters of intended use from receive sites outside of their jurisdictions, we cannot count the students from those sites because such letters must be filed prior to the "B" cut-off date of December 30, 1991.[3] Bellevue submitted four similar receive site letters with its application, none of which conforms to the requirements of Section 74.932 n.2 of our rules. Further, Bellevue included similarly deficient receive site letters with an amendment dated February 3, 1992, which is likewise beyond the cut-off date.[4] Consequently, for each applicant we will count enrolled students only at schools listed as receive sites that are within the applicants' respective jurisdictions. Accordingly, we credit Lindsay with 521 students, Thackerville with 335 students, and Bellevue with 180 students. Because the 180 students credited to Bellevue and the 335 credited to Thackerville each represent fewer than 80 percent of the total credited to Lindsay, Bellevue's and Thackerville's applications will be denied, and Lindsay will be authorized to operate facilities on channels D1-D4.

OTHER MATTERS

7. Lindsay proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931. Lindsay has submitted a copy of its lease with RuralVision South, Inc., which conforms in all respects to the Commission's requirements. Additionally, there is no petition to deny Lindsay's application, and we find the applicant to be fully qualified.

8. Accordingly, IT IS ORDERED, That the applications of Bellevue Independent School District (BPLIF-911008DT) and Thackerville Independent School District (BPLIF-911008DE) ARE DENIED, and that the application of Lindsay Independent School District (BPLIF-910603DC) IS GRANTED for channels D1-D4.

9. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

---

[3] Lindsay and Thackerville filed their letters on April 24, 1992.

[4] The letters contained in the amendment, further, do not contain all of the information required by our rules, since they do not discuss the types of programming and hours per week of formal and informal programming expected to be used and the site's involvement in the planning, scheduling, and production of programming, as required by Section 74.932, note 2 of our rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Satellite, Inc. — File Nos. 4/5-DSS-EXT-90

Application for Review of
Order Denying Extension of Time
to Construct and Launch Space
Stations in the Domestic
Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted January 13, 1993; Released: January 27, 1993

By the Commission:

1. National Exchange Satellite, Inc. (Nexsat) has filed an Application for Review of the order by the Common Carrier Bureau denying requests for extensions of time to construct and launch its "SpotNet" satellites and revoking the licenses for the system.[1] For the reasons discussed below, Nexsat's application is denied.

2. Nexsat's satellite system was authorized in November 1988.[2] That authorization required Nexsat to begin construction of its three hybrid satellites by August 1989, July 1990 and January 1991, respectively. If these deadlines were not met or extended for good cause by the Commission, the authorization, by its own terms, would become null and void. Nexsat requested and was granted one extension of its milestone deadlines to begin construction of its satellites.[3] Subsequently, Nexsat filed three more extension requests.[4] These requests were denied by the Common Carrier Bureau and Nexsat's satellite authorizations were declared null and void.[5] The Bureau based its denial on the fact that Nexsat had failed to demonstrate that a further extension of time would be consistent with well-established Commission policies against warehousing scarce orbital locations[6] or that delay in implementation was due to circumstances beyond Nexsat's control.

3. In its Application for Review, Nexsat argues that the Commission's policies against warehousing were instituted at a time when satellite capacity was scarce. It contends these policies are no longer valid because, Nexsat claims, demand for domestic satellite capacity is significantly reduced and there has been a decrease in the number of competitors in this market. Nexsat states that as a new entrant in this service, it does not have the economic incentive to engage in warehousing. In addition, it claims that because no other satellite licensee objected to its extension requests,[7] there are no potential applicants for orbital locations at this time. Nexsat also disputes the Bureau's conclusion that the delay in implementation was due to factors within Nexsat's control.

4. We affirm the Bureau's findings. Nexsat has failed to demonstrate why the Commission's long-standing policies requiring satellite licensees to comply with milestone deadlines are no longer in the public interest. Despite Nexsat's assertions, it has not submitted any evidence of a glut of domestic satellite transponder capacity. In the recent *3^0 Spacing* order, the Commission, focussing on C-Band services, rejected the claim that the demand for transponders in that band has so diminished that a 20% reduction in capacity was warranted.[8] There was no evidence submitted in that proceeding, or in this one, that demonstrates demand for Ku-Band transponders has significantly diminished.

5. Nexsat points to the fact that no applications have been filed for C or Ku-Band fixed-satellite space stations since 1988 and claims that this indicates a lack of interest in further expansion. We do not agree with Nexsat's assessment. In 1988, the Commission acted on a group of applications for facilities to be constructed within the next five years. Because Commission policy states that satellites will not be authorized more than five years in advance of their proposed launch date,[9] applicants have made long range plans accordingly and are now in the process of implementing their authorized facilities. The fact that additional applications have not been filed while licensees are constructing previously authorized satellites does not demonstrate that demand has, in fact, abated.

6. To the contrary, in order to accommodate the number of qualified applicants in the 1988 domestic fixed-satellite processing group, the Commission assigned most of the orbital locations remaining available at that time. In fact, the two orbital locations previously assigned to Nexsat's Spotnet satellites appear to be the among the few remaining unassigned locations offering 50 state coverage that are suitable for operation of hybrid satellites.[10] Given the expense involved in filing an application to construct and

---

[1] National Exchange Satellite, Inc., 7 FCC Rcd 1990 (1992) (*Extension Order*).

[2] National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988) (*Authorization Order*). See *Extension Order* for a detailed description of the facts surrounding Nexsat's extension requests.

[3] Letter from Chief, Domestic Facilities Division to Counsel, Nexsat, June 7, 1990.

[4] Before the Bureau acted on the second extension request, Nexsat filed two additional requests which, if granted, would have delayed the implementation of its system by three to four years. *See Extension Request* at paras. 4-6.

[5] *Extension Order, supra* note 1.

[6] American Telephone and Telegraph Co., 2 FCC Rcd 4431 (1987); MCI Communications Corp., 2 FCC Rcd 233 (Com. Car. Bur. 1987).

[7] Nexsat's extension requests were opposed by General Instrument Corporation (GIC) based on issues relating to GIC's petition to change Commission orbital spacing policies. The issues were discussed in Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Service to the Home, 7 FCC Rcd 456 (1992) (*3^0 Spacing*). These arguments were not addressed in the *Extension Order;* see note 1, *supra*.

[8] *3^0 Spacing* at para. 24-25.

[9] Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985).

[10] Hybrid satellites operate in both the C and the Ku-Bands and thus corresponding orbital locations in both bands are required. Recently, satellite operators have shown increased interest in constructing and launching hybrid satellites and have applied to combine single band satellites into hybrid facilities.

launch space station facilities,[11] it is unlikely potential applicants would apply to use the orbital locations assigned to Nexsat before the Commission ruled on its extension request. The fact that there are no applications on file at this time does not support Nexsat's claim that no other entities are interested in using these locations or that demand for transponder capacity has significantly declined.[12]

7. Nexsat also disputes the Bureau's finding that delay in implementation of its satellite system was based on factors within Nexsat's control. Two of Nexsat's extension requests were based on assertions that moretime was needed to resolve technical and design factors.[13] A third request cited Nexsat's negotiations with Edsat Institute (EDSAT) to provide transponder capacity to the national education community.[14] The Bureau noted that neither technical choices nor business or economic judgments constitute circumstances beyond a licensee's control sufficient to justify extension of milestone deadlines.[15]

8. We affirm the Bureau's conclusion. Nexsat has offered no evidence that its reconsideration of technical design or the contemplation of a possible contract with EDSAT were the result of circumstances distinguishable from those rejected as inadequate in precedent cited by the Bureau.[16] Nexsat was granted one extension after alleging that it could not begin construction of its satellites before action was taken on its request for reassignment of orbital locations.[17] Its requests for further open-ended extensions did not present any factors that could be considered beyond the control of the licensee and thus the Bureau was correct in denying the extensions.

9. Contrary to Nexsat's assertions, the Bureau did give a "hard look" to the circumstances presented by its case.[18] Based on this review, the Bureau correctly determined that granting further extensions would not be in the public interest. Nexsat is free to reapply for authorization to use available orbital locations after it has solidified its business and technical proposals and is ready to implement its system.

10. Accordingly, IT IS ORDERED that the decision of the Common Carrier Bureau denying National Exchange Satellite, Inc.'s requests for extensions of time and nullifying its licenses is affirmed and Nexsat's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

See, e.g., Hughes Communications Galaxy, Inc. 6 FCC Rcd 72 (Com. Car. Bur.1991); 5 FCC Rcd 3423 (Com. Car. Bur. 1990). Further, in the *3° Spacing* proceeding, another licensee, GE Americom, expressed interest in applying to use one of these locations, 127° W.L., if Nexsat were not granted a further extension of time.

[11] The fee for authorization to construct and launch a space station is $72,030, 47 U.S.C. § 158.

[12] It is not necessary to examine the issue of whether Nexsat, as a new entrant, had the economic incentive to warehouse orbital locations. The fact that milestone deadlines were not met, even after they had been extended, coupled with the conclusion that the policy for establishing and enforcing such deadlines continues to be in the public interest, is sufficient justification for affirming the Bureau's decision.

[13] *See Extension Order* at paras. 9-17.

[14] *Id* at para. 18.

[15] *See* MCI Communications Corporation, 2 FCC Rcd 233 (1987); American Telephone and Telegraph Company, 5 FCC Rcd 5590 (1990); *see also* P&R Temmer, 743 F.2d 918 (1984) (*Temmer*). Nexsat attempts to distinguish *Temmer* on the basis that Nexsat's delay in implementation was not due to a failure of technology as in *Temmer* but was instead due to an inability to locate a vendor and that there were a number of other applicants on a waiting list to use the channels in question. However, Nexsat itself indicated that at least one extension request was necessary because it was reconsidering its choice of technology and design. *Temmer* is thus relevant because the court there reaffirmed the Commission's position that technical choices or decisions which cause delay are circumstances within the control of the licensee and do not justify extensions of time or waivers regardless of the number of other potential applicants waiting for frequencies. *Id* at 930.

[16] *Id.*

[17] This extension was based on the possibility that Nexsat was confused about the requirement of meeting milestone deadlines pending an application for reassignment of orbital locations and not on circumstances deemed beyond Nexsat's control. *See* Letter, *supra* n.3.

[18] *See* Wait Radio v FCC, 418 F.2d 1153 (1969).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS	File Nos. ITC-91-139
SATELLITE	ITC-91-088
CORPORATION	ITC-91-089
	ITC-91-228
	ITC-92-031
	ITC-92-032

Applications for Authority to Provide
International Land Mobile-Satellite
Services Outside of North America
via the Inmarsat System

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: January 12, 1993; Released: January 27, 1993

By the Commission: Commissioner Barrett issuing separate statement.

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1 - 2
II. BACKGROUND	3 - 10
Inmarsat Land Mobile-Satellite Service	3 - 4
The Applications	5 - 10
III. DISCUSSION	11 - 26
Legal Issues	11 - 19
Public Interest Considerations	20 - 23
Safeguards	24 - 26
IV. CONCLUSION	27 - 29
V. ORDERING CLAUSES	30 - 42

I. INTRODUCTION

1. We have before us for consideration an application filed by the Communications Satellite Corporation (Comsat) on May 17, 1991, for authority to provide land mobile-satellite services (LMSS) to mobile-satellite terminals outside of North America via its regularly authorized fixed land earth stations and the International Maritime Satellite Organization (Inmarsat) First and Second Generation satellites. Comsat labels this service as "international LMSS." We also consolidate into this proceeding consideration of the requests Comsat has made in other applications to provide such services on Inmarsat Standard C, A, B and M terminals.[1] Comsat seeks authority to provide international LMSS pursuant to Sections 503 and 504 of the International Maritime Satellite Telecommunications Act of 1978 (Inmarsat Act) and Section 214 of the Communications Act of 1934, as amended. No petitions or comments were timely filed on any of these applications.[2]

2. For reasons discussed below, we find that grant of Comsat's applications is consistent with the established institutional and operational requirements of the Inmarsat Convention and Operating Agreement. Further, we find that Comsat's provision of international LMSS under the terms of its applications would be ancillary to, and supportive of, its provision of maritime services, and therefore permissible under the Inmarsat Act. Finally, we find such service to be in the public interest. Accordingly, we grant Comsat's applications.

II. BACKGROUND

3. *Inmarsat Land Mobile Satellite Service.* Inmarsat is an independent international organization comprised of 67 member nations. Inmarsat was initially created to establish an international maritime satellite system to improve global maritime communications for distress and safety of life at sea, public correspondence, radiodetermination and the management of ships.[3] The Inmarsat Act, 47 U.S.C. §§ 751-757, declares that it is the policy of the United States to support development and operation of a global maritime satellite telecommunications system by Inmarsat. The Act designates Comsat as the sole U.S. operating entity in Inmarsat and the owner and operator of the United States' share of the jointly owned international space segment and associated ancillary facilities.

---

[1] *See Communications Satellite Corp.*, File Nos. ITC-91-088 and ITC-91-089, 6 FCC Rcd 5765 (1991); *Communications Satellite Corp.*, ITC-91-228, 7 FCC Rcd 2218 (1992); *Communications Satellite Corp.*, File Nos. ITC-92-031 and ITC-92- 032, 7 FCC Rcd 149 (1992).

[2] The public comment period on Comsat's lead application ITC-91-139 terminated on September 5, 1991. On May 6, 1992, Motorola Satellite Communications, Inc. (Motorola) filed a motion to accept late-filed comments on Comsat's application, which Comsat opposed. Motorola alleged it was responding to Comsat's February 18, 1992, submission of additional support for the Commission's legal authority to authorize Comsat to provide international land mobile-satellite services. Yet the issue on which Motorola seeks to comment was raised initially in Comsat's May, 1991 application, and, thus, could have been addressed by Motorola during the comment period. Section 1.45(c) of our Rules provides that additional pleadings may be filed only if specifically requested or authorized by the Commission. Since the Commission has neither requested Motorola's comments, nor has Motorola shown good cause for accepting its comments eight months late, we deny Motorola's motion to accept its comments. Nonetheless, the issues raised by Motorola are fully addressed in this order (*see* paras. 11 to 20).

[3] Convention of the International Maritime Satellite Organization and Operating Agreement of the International Maritime Satellite Organization, September 3, 1976, 31 U.S.T. 1 (entered into force July 16, 1979).

4. Inmarsat, in January 1989, adopted at its Sixth (Extraordinary) Assembly of Parties meeting amendments to its Convention and Operating Agreement to extend Inmarsat's competence to include the provision of LMSS. Under Article 34(2) of the Convention and Article XVIII(2) of the Operating Agreement, amendments adopted and confirmed by the Assembly formally enter into force 120 days after the Inmarsat Depositary has received notices of acceptance and approval from Parties/Signatories representing two-thirds of the investment share in the system and comprising two-thirds of the Parties/Signatories as of the time of the Assembly action. There is no time limit on such acceptances and approvals. At present, 22 Parties/Signatories (including Comsat on behalf of the United States), representing approximately 78 percent of the relevant investment share, have accepted and approved the amendments. Acceptances and approvals by an additional 15 Parties/Signatories (regardless of investment shares) will complete the ratification process.

5. *The Applications.* Comsat requests authority to provide international LMSS via all of its regularly authorized fixed land earth stations[4] and portions of the Inmarsat system.[5] The term "international" LMSS, as used in Comsat's applications, refers to (1) mobile-satellite communications (via fixed land earth stations in the United States and Turkey) within and between foreign countries, excluding Canada and Mexico, and (2) communications between fixed land earth stations in the United States and Turkey and mobile-satellite terminals located outside of North America.[6] Comsat does not seek, and we do not here grant, authorization to provide LMSS to or from mobile-satellite terminals located in North America. For the purposes of these applications, Comsat defines land mobile-satellite services as those services to and from land-based "mobile earth stations" as defined in Article 1(i) of the amended text of the Inmarsat Convention.[7]

6. Comsat's applications appear to encompass not only international LMSS, but also service to international land-based temporary fixed-satellite earth stations operating in the LMSS frequency bands authorized herein.[8] Although this latter service is a fixed-satellite service, and not a land mobile-satellite service, we believe it is comparable in many ways to a land mobile-satellite service. Further, we have granted authorizations for temporary fixed-satellite services to Comsat on a case-by-case basis with grants of special temporary authority. Given these circumstances, we find it is administratively efficient to address international land-based temporary fixed-satellite service in this proceeding. Thus, any findings we make in regard to international land mobile-satellite terminals and services apply equally to international temporary fixed-satellite terminals and services operating outside of North America.

7. Comsat does not herein seek authority to construct or operate new satellite or fixed land earth station telecommunications facilities or to offer any new types of service to land mobile-satellite terminals, other than the types of services[9] already offered to maritime and aeronautical mobile-satellite terminals. This proceeding is limited to the terms of Comsat's requests.[10] Thus, we do not consider whether to grant Comsat authority to provide international LMSS via any other facilities or service types (*e.g.* Inmarsat Third Generation satellites, *Communications Satellite Corp.*, 7 FCC Rcd 6278 (1992)).

8. In its application, Comsat requests authority to serve any eligible mobile-satellite terminal in any foreign point outside North America reached by the Inmarsat System.[11] Such broad authority would eliminate the need for additional authority whenever a foreign telecommunications authority authorized new mobile-satellite terminals to operate with the System. Broad authority, as distinguished from case-by-case procedure, would reduce the burden on both the Commission's resources and Comsat's administrative costs. Moreover, Comsat states that only such broad authority could accommodate the proliferation of interna-

---

[4] Comsat uses the terms "coast earth station" and "land earth station" interchangeably in its application and clarifying letters. For purposes of conformity, we will refer to these stations as "land earth stations," as does Inmarsat in its Convention. *See Inmarsat Basic Documents*, (4th ed. 1989).

[5] Some of Comsat's facilities have already been authorized to provide international LMSS on a special temporary basis. *See* Special Temporary Authority, TAO-2064, granted May 12, 1992.

[6] For purposes of these applications, North America is defined as comprising the land area of Canada, Mexico, and the United States. The United States includes Alaska, Hawaii, Puerto Rico, and the Virgin Islands.

[7] Article 1(i) defines "mobile earth station" as "an earth station in the mobile-satellite service intended to be used while in motion or during halts at unspecified points." *See Inmarsat Basic Documents* (4th ed. 1989).

[8] We have also referred to these terminals as "land-based ship earth stations" in certain grants of temporary authority. *See e.g.* Special Temporary Authority, TAO-2045, granted April 23, 1992; Special Temporary Authority, TAO-2043, granted April 16, 1992. These land-based terminals typically consist of a portable unit which is erected on site. The terminal is often self-contained in a heavy suitcase, has a small, collapsible antenna approximately one meter in diameter, and is powered by batteries or AC power. These terminals typically are used for backup communications in areas where international telephone communication is either unreliable or unavailable.

[9] A service is defined both by the type of terminal served (*e.g.* Standard C, A, B, & M) and by the type of transmission carried by that terminal (*e.g.* voice, data or compressed video).

[10] This proceeding also encompasses consideration of Comsat's requests to provide: (a) Inmarsat Standard C international LMSS in the Atlantic Ocean Region-West (AORW) via its Southbury, Connecticut land earth station (WA-28)(FCC File No. ITC-91-088) and in the Pacific Ocean Region (POR) via its Santa Paula, California land earth station (KA-31) (FCC File No. ITC-91-089); (b) Inmarsat Standard M and B international LMSS in the Atlantic Ocean Region-East (AORE) and AORW via Station WA-28 (FCC File No. ITC-92-030), and the POR via Stations KB-34 and KA-31 (FCC File No. ITC-92-031); and (c) Inmarsat Standard A international LMSS in the Indian Ocean Region (IOR) via its Turkey (also spelled Turkiye) land earth station (FCC File No. ITC-91-228). These applications have already been partially granted, but we deferred acting on those sections of the application which requested authority to provide international LMSS.

[11] Comsat has categorized this request as one for "blanket" authority. However, we do not choose to use this term due to the ambiguity between this and other cases where blanket authority is used to license a large number of mobile terminals. Here, we are not licensing the mobile-satellite terminals used to provide LMSS, but instead grant authority to provide land mobile-satellite service to those mobile-satellite terminals already licensed by the foreign telecommunications authority of the country in which the terminals operate.

tional applications expected with the advent of Inmarsat LMSS service, particularly service to Standard C mobile-satellite terminals.[12]

9. Comsat states all land mobile-satellite services will operate in conformance with the International Telecommunication Union (ITU) Radio Regulations and the FCC's domestic allocations, as both may be modified from time to time.[13] For example, since the Inmarsat Standard C service is limited to non-speech, low bit rate transmissions, Comsat states it will not present a problem to the management of the satellite power/bandwidth resources allocated primarily to maritime mobile-satellite services (MMSS). Further, land mobile-satellite terminals which may be needed to support voice services, from time to time, will utilize directive antennas in order to conserve satellite resources and protect link margins on MMSS operating in the band. Comsat states it is cognizant of its statutory mandate to serve maritime commercial, safety and distress needs, and recognizes that serving those needs remains its first priority.

10. Comsat proposes to provide international LMSS consistent with the frequency bands the Commission has allocated for maritime services. Comsat states its international land mobile-satellite terminals will communicate in the transmit frequency bands 1626.5-1645.5 MHz and the receive bands 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile-satellite services.[14] The only portions of the proposed satellite communications services that will occur actually within the United States will be satellite uplinks from, and downlinks to, Comsat's U.S. fixed land earth stations operating in C-Band (except for narrowband pilot, test, and order wire signals operating in the L band). Comsat's Southbury, Connecticut and Santa Paula, California land earth stations will transmit to Inmarsat Second Generation satellites on 6425-6440 MHz and receive on 3600-3620 MHz. Comsat will use Inmarsat First Generation satellites only as backups to the Second Generation satellites. Due to operational constraints associated with the Inmarsat First Generation satellites (these satellites are only capable of supporting 7.5 MHz of these frequency bands), Comsat's land earth stations will transmit on 6417.5-6425 MHz and receive on 4192.5-4200 MHz when operating with these satellites.

III. DISCUSSION

11. *Legal Issues.* There are two legal issues we must resolve before we can consider the public interest aspect of Comsat's application. First, does the Commission have authority to authorize U.S. participation in land mobile-satellite services via Inmarsat before the amendments to the Inmarsat Convention and Operating Agreement providing for this service actually enter into force? Second, does the Inmarsat Act prohibit Comsat from participating in the provision of international land mobile-satellite services? After reviewing the record in this proceeding and past Commission precedent, we answer in the affirmative. Grant of Comsat's application would not be barred by either the Inmarsat Convention and Operating Agreement or the Inmarsat Act, if otherwise found to be in the public interest.

12. In a formal opinion, Inmarsat's General Counsel has concluded that the Signatories' provision of LMSS on a commercial basis prior to formal entry into force of those amendments[15] is consistent with general principles of international law, the provisions of the Inmarsat Convention, and the prior practice of both Inmarsat and the ITU.[16] The opinion noted that the Assembly of Parties at its Eighth Session in September 1991 "reviewed the actions of the Council in ... authorizing the start of revenue earning [land mobile-satellite] services."[17] Indeed, the Assembly in its Report noted that "Inmarsat's land-based commercial services are now available in all four ocean regions, the commissioning of land-based mobile-satellite earth stations is increasing rapidly, and new systems, standards and applications for land mobile-satellite services are under active development."[18] Further, no Party at the Assembly, which included the United States, voiced any objection to the fact that Inmarsat Signatories were providing LMSS on a commercial basis via the Inmarsat system.[19] [20]

---

[12] *See Communications Satellite Corp.*, File No. ITC-91-088, 6 FCC Rcd 5765 (1991).

[13] Comsat also states that all of its services will be provided in accordance with the Convention, Operating Agreement and rules and policies of both INTELSAT and Inmarsat, with Inmarsat space segment capacity leased to INTELSAT for the purpose of obviating the need for consultation with INTELSAT of certain Inmarsat services. Comsat states that lease of capacity used for services encompassed by its application would be pursuant to a Lease Agreement approved by both the INTELSAT Board of Governors and the Inmarsat Council, a copy of which was provided to the Commission by Comsat in its Application of October 24, 1984 (FCC File No. ITC-85-024). However, we find that the referenced lease agreement only applies to temporary fixed-satellite services, and not to mobile-satellite services. Therefore, the lease between INTELSAT and Inmarsat is not applicable to the mobile-satellite service portion of Comsat's application. Thus, since INTELSAT is not involved in the provision of mobile-satellite service through a space segment lease mechanism, Comsat must consult its provision of land mobile-satellite services pursuant to Article XIV of the INTELSAT Agreement.

[14] In accordance with the priority and pre-emption requirements of the Global Maritime Distress and Safety System, the bands 1544-1545 MHz (receive) and 1645.5-1646.5 MHz (transmit) shall only be used for maritime safety and distress communications.

[15] *See* ¶ 4, *supra*.

[16] Formal Opinion of Dr. Wolf von Noorden, General Counsel of Inmarsat, dated November 7, 1991, Attachment No. 1 to Comsat's February 18, 1992 letter clarifying its application (hereinafter *Opinion*).

[17] *Opinion* at 5.

[18] Inmarsat Assembly, Doc. 8/16, ¶ 4.1(b).

[19] *Id.*

[20] We note that on April 13, 1992 the United States Department of State notified the Commission that it had no policy or legal objections to Inmarsat's and Comsat's provision of land mobile satellite services since it is their belief that the provision of such service, even in the absence of entry into force of the LMSS amendments to the Inmarsat Convention, would be consistent with U.S. international obligations under the Convention. *See* Letter dated April 13, 1992 from Randolph C. Earnest, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, United States Department of State to George Li, Chief, International Facilities Division, Federal Communications Commission.

13. Furthermore, we recently authorized Comsat to lease Inmarsat space segment to American Mobile Satellite Corp. (AMSC) for provision of interim domestic LMSS.[21] In so doing, we relied upon an Inmarsat Council policy statement[22] that approved of the leasing of Inmarsat space segment on a secondary basis for applications to provide services pursuant to amendments of the Convention which have been adopted but which have not yet entered into force. Though the Council policy statement dealt solely with the provision of land mobile-satellite service by a lessee of a Signatory, the reasoning of the statement is consistent with the commercial provision of land mobile-satellite services by Signatories themselves, *i.e.* services provided on leased capacity stand on no better footing than services provided directly by Signatories. For all of the reasons stated above, we find that we have authority consistent with the Inmarsat Convention and Operating Agreement to authorize U.S. participation in land mobile-satellite services via Inmarsat. However, we note that this authority is not determinative of the competence of Comsat to provide such services, as this latter issue involves additional issues relating to compliance with U.S. national law.

14. Thus, we must address whether under the Inmarsat Act we may authorize Comsat to provide international LMSS via the Inmarsat system. The Inmarsat Act declares that "[i]t is the purpose of this subchapter to provide that the participation of the United States in Inmarsat shall be through the Communications Satellite Corporation," and designates Comsat to be "the sole operating entity of the United States for participation in Inmarsat, for the purpose of providing international maritime satellite telecommunications services."[23]

15. While the Inmarsat Act does not expressly authorize Comsat to provide international land mobile-satellite or any service other than international maritime, we have previously found that nothing in the Immarsat Act expressly prohibits Comsat from providing services that are ancillary to, and supportive of, its maritime services. In our *Aeronautical Services Order*, we stated we may, under the Inmarsat Act, authorize Comsat to provide non-maritime services via the Inmarsat system if those services are "ancillary to, and supportive of," Comsat's provision of maritime satellite services through Inmarsat.[24] In the context of international aeronautical services,[25] we framed the issue as "whether Comsat's provision of Inmarsat aeronautical services is closely related to and important to protect or promote either its provision of maritime satellite services or its participation in Inmarsat decisions regarding maritime services."[26] We answered that question in the affirmative for the facts at hand based on the following three "critical factors": (1) aeronautical services would be subsidiary to maritime services which would remain Inmarsat's primary mission; (2) aeronautical and maritime services would be provided over common space satellite resources and ground facilities, would use both common and contiguous spectrum, and would thus spread common operational costs over a wider revenue stream (which we anticipated would translate into lower tariffs for maritime users); and (3) the resulting integrated operation of aeronautical and maritime services would not permit Inmarsat Council decisions regarding the planning and use of space segment to be separated in terms of aeronautical and maritime services.[27] Therefore we found that Comsat's provision of aeronautical services through Inmarsat would be ancillary to, and supportive of, its Inmarsat maritime services.

16. We find that Comsat's provision of international LMSS via the Inmarsat system, like the provision of international aeronautical services, is ancillary to, and supportive of, its provision of maritime services under the criteria established in the *Aeronautical Services Order*. First, the land mobile amendments, like the aeronautical amendments before them, recognize and reaffirm the primacy of Inmarsat maritime services.[28] As a result, Comsat's provision of international land mobile-satellite services, like its provision of international aeronautical satellite services, "from the standpoint of institutional obligations ... would not require it to undertake obligations inconsistent with the stated purpose of the [Inmarsat] Act."[29]

---

[21] *American Mobile Satellite Corp. (AMSC)*, 7 FCC Rcd 942, 944 & n.18 (1992).

[22] *See* Inmarsat Council, Doc. 31/19, Annex 1, A1, B4 and B7(b).

[23] 47 U.S.C. §§ 751(b), 752(a)(1).

[24] *Provision of Aeronautical Services via the Inmarsat System*, 4 FCC Rcd 6072, 6084-87 (1989)(hereinafter *Aeronautical Services Order*).

[25] In October 1985 the Inmarsat Assembly, at its Fourth Session, adopted and confirmed amendments to its Convention and Operating Agreement extending Inmarsat's competence to the provision of aeronautical satellite communications. These amendments formally entered into force on October 13, 1989. *See Inmarsat Basic Documents* (4th ed. 1989) and paragraph 6.

[26] *Aeronautical Services Order*, 4 FCC Rcd at 6086.

[27] *Id.*

[28] As amended, Article 3 of the Inmarsat Convention states that the purpose of the Inmarsat system "is to make provision for the space segment necessary for improving maritime communications and, *as practicable*, aeronautical and land mobile communications" (emphasis added). We interpret this Article to mean that only maritime communications is mandated; aeronautical and land mobile communications are merely permissive. Thus, should there ever arise a conflict between providing maritime service and other services (aeronautical or land mobile), the organization must satisfy the maritime needs first. Such arrangement, if required, would probably be notified to aeronautical and land mobile users well in advance of any diminution of service to them rather than assigning a higher "priority" to maritime service on a real time basis. *Cf.* "Land Mobile Satellite Communications: A Further Development in International Space Law (Part II)," Dr. Wolf von Noorden and Phillip Dann, 17 J. Space Law 103, 108-9 (1989)(personal views of Inmarsat's General Counsel regarding priorities between maritime, land mobile and aeronautical services).

Comsat states that for the near term there is sufficient space segment capacity on Inmarsat Second Generation satellites for Signatories to meet anticipated demand for maritime and land mobile services. Nonetheless, for the longer term, Comsat states it is working with the Inmarsat Directorate to develop a means of distinguishing at the network control center and the land earth station between maritime- and land mobile-originated transmissions to allow for the primacy of maritime services. We expect this capability to be accomplished in the near future and we will monitor its progress. (We note that the same provisions for distinguishing between land mobile and maritime services also apply to aeronautical services.)

[29] *Aeronautical Services Order*, 4 FCC Rcd at 6086.

17. Second, Comsat and other Inmarsat Signatories will use the same Inmarsat space segment, common ground resources, and common and contiguous spectrum (coordinated for Inmarsat use outside of North America[30]) to provide maritime, aeronautical and land mobile-satellite services. Thus, Comsat's provision of international LMSS will entail a relatively small incremental increase in Comsat's fixed costs, while significantly enlarging the traffic base over which Comsat spreads those costs. As a result, the integrated provision of maritime, aeronautical, and international land mobile-satellite services "should permit Comsat to provide maritime services more efficiently and cost-effectively by distributing common capital costs and expenses across a multi-service rather than a single service base."[31] As we recognized in our *Aeronautical Services Order*, the resulting lower cost basis should not only benefit U.S. maritime users directly through lower maritime tariffs,[32] but should also allow Comsat to assume a more even footing in competing with foreign Signatories that can also spread their fixed costs over revenue from all three services.[33]

18. Third, as we noted in authorizing Comsat to provide aeronautical services, because of the integrated nature of the First and Second Generation of the Inmarsat system, Inmarsat decisions regarding this satellite system design, system planning, technical characteristics, spacecraft procurement, provisions for spares, launch considerations, network management, and other critical issues have not been, and cannot be, separated and addressed solely from the individual perspectives of maritime, aeronautical, or land mobile-satellite communications.[34] Indeed, the Inmarsat earth stations in question are portable and are equally useful at sea and for land communications.

19. In view of these factors, we conclude that from an operational standpoint Comsat's provision of international LMSS would be ancillary to, and supportive of, its provision of maritime services via First and Second Generation Inmarsat satellites. Because of the ancillary nature of international LMSS, Comsat's competence to provide these services flows from the Inmarsat Act even though the Act does not expressly authorize Comsat to provide such services. We therefore conclude that Comsat's provision of international LMSS as requested in this application is legally permissible under the Inmarsat Act given the facts provided in its applications.

20. *Public Interest Considerations.* For a number of reasons, we find that Comsat's provision of international LMSS is in the public interest. First, many nations currently have no other way of obtaining this much needed communications service outside of Inmarsat. Access to this service can provide emergency and disaster support under circumstances where terrestrial networks are not available, such as in cases of earthquakes, hurricanes, airplane crashes, forest fires, and other natural disasters in remote areas. This service can also provide a communications link to the outside world for emergency medical relief and international health programs.

21. Second, provision of international LMSS in foreign countries will enable users with combined maritime and terrestrial "communications needs to achieve substantial economies by utilizing an integrated communications system and similar mobile-satellite terminals to satisfy those needs.[35] This service will make it possible for U.S. companies to communicate on a cost-effective basis with mobile units in foreign countries lacking access to modern telecommunications facilities. It will enable companies to monitor ongoing operations, track shipments, communicate safety-related and business information, and assist in deterring truck hijackings. It also will allow news and media agencies to quickly gather and report news on breaking world events such as wars and insurrection from points around the world.

22. Third, the service will allow government and private entities to monitor weather, seismic, and other conditions through unattended satellite terminals in remote foreign locations. It will enable foreign countries with sparsely developed terrestrial networks to obtain domestic communications links for underdeveloped areas at a low cost, fostering enhanced communications and economic development.

23. Finally, grant of Comsat's application to provide this service will enhance U.S. competitiveness in foreign markets. It will enable Comsat to compete on an equal footing with foreign Inmarsat Signatories.

24. *Safeguards.* In our *Aeronautical Services Order*, we implemented several safeguards to ensure that Comsat's position as U.S. Signatory to Inmarsat would not deter competition by other U.S. companies in the provision of aeronautical services.[36] These safeguards apply equally here. As in aeronautical services, we emphasize that Comsat will not be the only service provider which may provide international land mobile-satellite earth station services. Specifically, Comsat shall acquire space segment capacity from Inmarsat and provide this capacity both to international land mobile-satellite customers using Comsat's fixed land earth stations and to U.S. service providers which may operate their own international land earth stations and resell Inmarsat space segment capacity to international land mobile-satellite customers. Comsat shall submit appropriate applications to Inmarsat on behalf of its customers seeking to utilize space segment capacity for provision of international land mobile-satellite services. In order to provide other U.S. providers of Inmarsat international land mobile-satellite services an opportunity to participate in the Inmarsat decision-making process, Comsat shall make available to them, in a timely manner, land mobile-related Inmarsat Council documents prior to Council meetings subject to conclusion of appropriate non-disclosure agreements.

---

[30] The United States, Inmarsat and other countries are still engaged in coordination of spectrum assignments for service to mobile-satellite terminals.

[31] *Id.*

[32] The Commission will monitor Comsat's maritime tariffs for all services to determine the extent of these tariff reductions resulting from the economies of scale.

[33] *Id.* at 6087.

[34] *Id.*

[35] Due to technical similarities between MMSS terminals and (voice) LMSS terminals, Inmarsat is able to allocate its space segment resources efficiently to accommodate multiple applications, yielding the economies and efficiencies that multipurpose systems afford. Comsat will use the same Inmarsat space segment and the same land earth station facilities and internationally allocated spectrum to provide these international land mobile services, and users will operate similar terminals to send and receive communications. *See* note 30, *supra*.

[36] *Aeronautical Services Order*, 4 FCC Rcd at 6082-84, ¶ ¶ 75-85.

25. Further, Comsat shall file unbundled international land mobile-satellite space and earth segment tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, Section 504 of the Inmarsat Act, 47 U.S.C. § 754, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61. Comsat shall isolate the capital and expense costs of the international land mobile-satellite portion of its Inmarsat activities and separate the international land mobile-satellite accounts from accounts used to compute rates to aeronautical and maritime users. Comsat's rates shall cover all investment and operational costs associated with international land mobile-satellite services. Also, Comsat shall, within 90 days from the release of this order, file a complete description of the accounting system and cost allocation procedure used to develop these unbundled international land mobile-satellite space and earth segment services.

26. Finally, on another matter, the United States Coast Guard submitted a letter expressing informally its concerns that waivers of rules affecting maritime mobile-satellite allocations could potentially affect the operation of the Global Maritime Distress and Safety System (GMDSS). Although the Coast Guard has not asked us to formally address these concerns in this proceeding, we note that Comsat has stated it will maintain, as its first priority, service for maritime commercial, safety and distress needs.

IV. CONCLUSION

27. We find that grant of this application is fully consistent with U.S. obligations under the Inmarsat Convention and Operating Agreement. Further, we conclude, for the reasons stated in this Order, that the Inmarsat Act does not bar us from authorizing Comsat to provide ancillary land mobile-satellite space segment and land earth station services as the U.S. operating entity in Inmarsat. In this regard, we find that Comsat's provision of Inmarsat land mobile-satellite services to land mobile-satellite terminals outside of North America, as proposed in this application, will be ancillary to, and supportive of, its provision of maritime services and therefore permissible under the Inmarsat Act. Finally, we find this grant to be in the public interest since it will advance U.S. competitiveness in world markets.

28. Thus, Comsat is authorized to provide land mobile-satellite services within and between foreign countries (excluding Canada and Mexico) and between fixed land earth stations in the United States and Turkey and mobile-satellite terminals located outside of North America. Comsat does not request and, we do not here grant, authority to provide land mobile-satellite services to or from mobile-satellite terminals located in North America as defined herein.

29. Before Comsat can commence offering international LMSS, the licenses of its fixed land earth stations regularly authorized to communicate with Inmarsat First and Second Generation satellites must be modified to provide for LMSS. Comsat's fixed land earth stations will require no hardware installations or modifications to begin providing international LMSS since we are authorizing Comsat to provide LMSS only via its existing land earth stations and only on frequencies already authorized to these stations. The only difference is the type of mobile-satellite terminal, land-based instead of ship-based, with which we are authorizing these stations to communicate. Thus, the only necessary modifications to the licenses of Comsat's earth stations are: (1) the addition of LMSS as a service category; and (2) the specification of the frequency (feeder link) bands requested in the application to provide this service. Pursuant to Section 316(a)(1) of the Communications Act of 1934, as amended, the Commission can modify any station license for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity. Since the decision to allow international LMSS within the limited frequency bands specified herein is already made in this order, we will on our own motion modify the licenses of Comsat's fixed land earth stations authorized to communicate with Inmarsat First and Second Generation satellites to authorize the provision of international land mobile-satellite services.

V. ORDERING CLAUSES

30. Upon consideration of the above-captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of certain international land mobile-satellite and land-based temporary fixed-satellite services by the Communications Satellite Corporation.

31. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 503 and 504 of the International Maritime Satellite Act of 1978, 47 U.S.C. §§ 752 and 753, the application File No. ITC-91-139 IS GRANTED and the Communications Satellite Corporation IS AUTHORIZED to provide international land mobile-satellite and land-based temporary fixed-satellite services within and between foreign countries, excluding Canada and Mexico,[37] and between fixed land earth stations in the United States and Turkey and mobile-satellite terminals in foreign points outside of North America (as defined herein at note 6). These services are to be provided only via Comsat's existing fixed land earth stations in the United States and Turkey and via the First and Second Generation satellites of the International Maritime Satellite Organization in spectrum internationally allocated to LMSS.

32. IT IS FURTHER ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 503 and 504 of the International Maritime Satellite Act of 1978, 47 U.S.C. §§ 752 and 753, and subject to the limitations contained in paragraph 31 herein, the deferred sections of applications File Nos. ITC-91-088, ITC-91-089, ITC-92-030, ITC-92-031, and ITC-91-228 ARE GRANTED and the Communications Satellite Corporation IS AUTHORIZED to provide Inmarsat Standard C international LMSS in the Atlantic Ocean Region-West (AORW) via its Southbury, Connecticut land earth station (WA-28) and in the Pacific Ocean Region (POR) via its Santa Paula, California land earth station (KA-31); IS AUTHORIZED to provide Inmarsat Standard M and B international LMSS in the Atlantic Ocean Region-East

[37] Service also shall be excluded to countries for which the United States has an embargo on telecommunications.

(AORE) and AORW via Station WA-28, and in the POR via Stations KB-34 and KA-31; and IS AUTHORIZED to provide Inmarsat Standard A international LMSS in the Indian Ocean Region (IOR) via its Turkey land earth station.

33. IT IS FURTHER ORDERED that this broad authority does not cover the provision of international LMSS or land-based temporary fixed-satellite services via any new land earth stations or Inmarsat satellites or cover any land mobile-satellite services not specifically authorized herein.

34. IT IS FURTHER ORDERED that this authorization is conditioned upon completion of the consultation(s) required by Article XIV(d) of the Intelsat Agreement to ensure technical compatibility and to avoid significant economic harm. In addition, Comsat shall maintain as its first priority the service of maritime commercial, safety and distress needs, and in particular uphold the safety and distress requirements of the Global Maritime Distress and Safety System.

35. IT IS FURTHER ORDERED that Comsat is authorized to provide international LMSS and land-based temporary fixed-satellite services only within the frequency bands below which are consistent with the U.S. allocation for maritime services. Thus, Comsat shall serve only those land mobile-satellite and land-based temporary fixed-satellite terminals communicating in the transmit frequency bands 1626.5-1645.5 MHz and the receive bands 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile-satellite services. In addition, users of this service shall obtain the appropriate license or other authorization from the local telecommunications authority of the country in which the terminal will be used and any necessary licenses or authorizations from Agencies or Departments of the United States government (such as Treasury or Commerce). Thus, this authorization shall not be construed as providing domestic uplink or downlink authority within countries outside of North America.

36. IT IS FURTHER ORDERED that the only portions of the satellite communications services authorized herein to occur within the United States shall be satellite uplinks from, and downlinks to, Comsat's U.S. fixed land earth stations in the C-Band, except for narrowband pilot, test, and order wire signals operating in the L band. Comsat's Southbury, Connecticut and Santa Paula, California land earth stations shall communicate via the Inmarsat Second Generation satellites on 6425-6440 MHz and receive on 3600-3620 MHz. Comsat is authorized to use Inmarsat First Generation satellites only as backups to the Second Generation satellites. Due to operational constraints associated with the Inmarsat First Generation satellites (these satellites are only capable of supporting 7.5 MHz of these frequency bands), Comsat's land earth stations shall transmit on 6417.5-6425 MHz and receive on 4192.5-4200 MHz when operating with these satellites.

37. IT IS FURTHER ORDERED that, pursuant to Section 316(a)(1) of the Communications Act of 1934, as amended, we find the public interest, convenience, and necessity would be served by modifying, on our own motion, the licenses of Comsat's fixed land earth stations regularly authorized to communicate with Inmarsat First and Second Generation satellites so as to authorize the provision of international land mobile-satellite and land-based temporary fixed-satellite services. Therefore, we hereby MODIFY the licenses of the following fixed land earth stations to authorize the provision of international land mobile-satellite and land-based temporary fixed-satellite services as described in paragraphs 31, 35-36:

a. Comsat World Systems Division's (Comsat WSD's) Southbury, Connecticut land earth station WA-28;

b. Comsat WSD's Santa Paula, California land earth station KA-31;

c. Comsat WSD's Southbury, Connecticut land earth station authorized under CSG-90-074-P/L;

d. Comsat General's Southbury, Connecticut land earth station KA-313;

e. Comsat General's Southbury, Connecticut land earth station WB-36;

f. Comsat General's Santa Paula, California land earth station KB-34; and

g. Comsat General's Southbury, Connecticut land earth station KA-312.

38. IT IS FURTHER ORDERED that, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, and Section 504 of the Inmarsat Act, 47 U.S.C. § 754, Comsat shall file such amendments to current tariffs with the Commission consistent with this decision. Comsat also shall file, within 90 days of the release of this Order, a complete description of its accounting system and cost allocation procedures.

39. IT IS FURTHER ORDERED that Comsat shall file with the Commission every six months a letter reporting Inmarsat's progress in developing a means of distinguishing between maritime, aeronautical, and land mobile-satellite transmissions to allow for the primacy of maritime services and compliance with Commission Regulations and Rules regarding use of these bands.

40. IT IS FURTHER ORDERED that Motorola Satellite Communications, Inc.'s Motion to Accept Comments is DENIED.

41. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

42. This order is effective upon adoption. Petitions for Reconsideration under Section 1.106 may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Separate Statement

of

Commissioner Andrew C. Barrett

In Re: COMSAT Applications to Provide International Land Mobile-Satellite Services via the International Maritime Satellite Organization System [INMARSAT] outside of North America.

This Order authorizes COMSAT to provide international land mobile-satellite services [LMSS], including service to international land-based temporary fixed-satellite earth stations, via INMARSAT to foreign points outside of North America. I support this action. At this point, I am satisfied that the Commission has required certain safeguards which will require COMSAT to offer LMSS ancillary to its primary INMARSAT maritime service mission. The operational and tariff safeguards in this Order should not allow COMSAT to become the only U.S. provider of LMSS services via INMARSAT space segment capacity.[1] Further, this Order does not authorize COMSAT to provide international LMSS via any other facilities or service types that COMSAT may later request, or that may be authorized in the future. Thus, COMSAT is authorized to provide ancillary LMSS via INMARSAT's present First and Second generation satellite system. This service can be provided to mobile-satellite terminals already licensed by foreign telecommunications authorities outside of North America.[2]

I write separately to express my concern regarding the broad interpretation of the INMARSAT Act adopted in this Order. In addition to a flexible interpretation of the Inmarsat Convention and Operating Agreement, and Inmarsat Council Policy Statements, this Order undertakes a broad interpretation of the INMARSAT Act [Act] with respect to COMSAT services. By stating that the Act does not expressly prohibit COMSAT from providing services ancillary and supportive of its maritime services, the Order opens up a range of services that can be classified as ancillary.[3] As we gain experience with the extent to which the aeronautical and LMSS services offered by COMSAT are <u>really</u> ancillary, I am concerned that the Commission does not lose its ability to restrict any future expansion of COMSAT services via INMARSAT, if the public interest so dictates. From a public

---

1 See Memorandum, Opinion, Order and Certificate at 12-13.

2 See Order at 5 and 11.

3 See Order at 9.

policy perspective, I want to ensure that the Commission does not establish de facto precedent that make it unnecessarily difficult for other commercial satellite service providers to compete with COMSAT for LMSS service customers in foreign markets. Thus, I do not want our broad interpretation of the INMARSAT Act in this Order to serve as precedent for any future authorization requests that COMSAT may seek to undertake. As we gain experience with COMSAT operations in LMSS, I will monitor the situation to ensure that future interpretations of COMSAT authority under the INMARSAT Act are not overly broad, in light of the public interest concerns that may arise.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ASIAN AMERICAN TELECOM — File No. I-T-C-92-260

Application for Authority Under Section 214 of the Communications Act of 1934, as amended, for the provision of IBS, INTELNET and International Television Service, and to Establish Channels of Communication between the United States and Russia for the provision of switched voice and data services

ORDER AND AUTHORIZATION

Adopted: January 15, 1993; Released: January 27, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application filed pursuant to Section 214 of the Communications Act of 1934, as amended, by Asian American Telecom[1] (AAT), we find that the public convenience and necessity would be served by AAT's addition of earth stations in the continental United States as points of communication for those services previously authorized by the Commission.[2]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-260 IS GRANTED, and AAT is authorized to:

a. establish channels of communications between appropriately authorized earth stations in the continental United States and appropriate INTELSAT satellites in the Pacific Ocean, for the provision of IBS, INTELNET and International Television Service between the United States and countries listed in Comsat's tariff F.C.C. No. 103 for the space segment of IBS, INTELNET and International Television Service;

b. lease from Comsat and operate 512 kbps of capacity between appropriately authorized earth stations in the continental United States and appropriate INTELSAT satellites over the Pacific Ocean, connecting with similar circuits between the satellites and earth stations in Russia,[3] for the provision of switched voice and data service between the United States and Russia; and

c. lease and operate appropriate domestic connecting facilities between the earth stations and AAT's operating center.

3. IT IS FURTHER ORDERED that our authorization of AAT to provide private lines is limited to the provision of such private lines only between the United States and those countries authorized under Comsat's tariff F.C.C. No. 103 -- that is, private lines which originate in the United States and terminate in one of the countries authorized for IBS service under Comsat's tariff, or which originate in one of the foreign countries authorized for IBS service under Comsat's tariff and terminate in the United States. In addition, AAT may not -- and AAT's tariff must state that AAT's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992).

4. IT IS FURTHER ORDERED that neither AAT nor any persons or companies directly or indirectly controlling or controlled by AAT, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which AAT or any persons or companies controlling or controlled by AAT are parties.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AAT and its correspondent in each of the countries to which it is authorized to provide service, and AAT shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. § 43.51(a)(3)).

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 C.F.R. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

---

[1] We placed the application on public notice September 16, 1992. No comments were filed.

[2] *See* Asian American Telecom, 7 FCC Rcd 5266 (1992).

[3] AAT states that it has no ownership or controlling interest in foreign facilities.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. § 63.10(b), for INTELSAT satellite circuits.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT — File No. BPED-821013AD

For a Construction Permit to Modify Noncommercial Station WRRH(FM), Franklin Lakes, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1993; Released: January 27, 1993

By the Commission:

1. The Commission has before it a petition for reconsideration filed on September 12, 1988 by Ramapo Indian Hills Regional High School District ("Ramapo"). Ramapo seeks reconsideration of the Commission's decision in *Ramapo Indian Hills Regional High School District*, 3 FCC Rcd 4859 (1988).[1] Therein, the Commission upheld the Mass Media Bureau's ("Bureau") dismissal of Ramapo's application to upgrade the facilities of WRRH(FM), Franklin Lakes, New Jersey. Ramapo's proposal would have violated Section 73.509 of the Commission's Rules by creating prohibited overlap of its signal with the signals of the licensed second-adjacent channel facilities of noncommercial educational stations WFDU-FM, Teaneck, New Jersey and WBGO-FM, Newark, New Jersey.

2. In the instant petition for reconsideration, Ramapo for the first time includes an engineering study which provides data on the population which would be affected by the potential interference and once again claims that the predicted interference is *de minimis*. Ramapo also contends that the Commission has allowed other similarly situated applicants to proceed to a comparative hearing, while Ramapo's application was dismissed without such a hearing, citing *Virginia Beach Educational Broadcasting Foundation* ("*Virginia Beach*"), 2 FCC Rcd 3891 (M.M. Bur. 1987); *Family Stations, Inc.* ("*Family Stations*"), Hearing Designation Order in MM Docket 86-354, 51 Fed. Reg. 34,684 (M.M. Bur. released September 24, 1986); and *Real Life Educational Foundation of Baton Rouge, Inc.* ("*Real Life*"), 3 FCC Rcd 4359 (M.M. Bur. 1988). Ramapo argues that dismissal of its application was therefore arbitrary and capricious.

3. Because Ramapo's petition seeks reconsideration of our denial of its application for review, it is governed by the procedures set forth in 47 C.F.R. § 1.106(b)(2). Section 1.106(b)(2) states that

> [w]here the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) [t]he petition relies on fact which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) [t]he petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

The population data that Ramapo has now submitted do not constitute "new facts or changed circumstances" that were unknown to Ramapo at the time of its last opportunity to present such matters to the Commission. Thus, Ramapo is barred from submitting the information at this time.

4. Concerning Ramapo's claim of inconsistent treatment, the three cases cited by Ramapo to support this contention are inapposite. In the cases cited, the applicants were afforded a comparative hearing as a matter of right because their proposals, at the time of filing, conflicted with other timely-filed mutually exclusive proposals. Herein, Ramapo's current contention that its application is mutually exclusive with the renewal applications of WFDU-FM and WBGO-FM does not *ipso facto* create mutual exclusivity and require resolution in a hearing. *KLUC Broadcasting Co.*, 41 RR 2d 863, 864 (1977), *application for review denied*, 42 RR 2d 178 (1978). Ramapo, in the 1982 filing of its application, certified that it was not mutually exclusive with any other applications. In 1984, when WFDU-FM and WBGO-FM filed renewal applications, Ramapo failed to amend its application to indicate that it was now mutually exclusive with these renewal applications. *Ramapo Indian Hills Regional High School District*, 3 FCC Rcd at 4860. Since Ramapo's application, pursuant to its own certification, was not mutually exclusive with the renewal applications of WDFU-FM and WBGO-FM, it was not entitled to a comparative hearing as a matter of right and was not in the same procedural posture as the applicants in the above-mentioned cases.

5. Accordingly, for the foregoing reasons, IT IS ORDERED, That the petition for reconsideration filed on September 12, 1988 by Ramapo Indian Hills Regional High School District IS DENIED.[2]

---

[1] Oppositions were filed on September 27, 1988, by Farleigh Dickinson University, licensee of WFDU-FM, Teaneck, New Jersey, and Newark Public Radio, licensee of WBGO-FM, Newark, New Jersey. Ramapo filed a reply to both oppositions on October 7, 1988, and a supplement to petition for reconsideration on December 13, 1988.

[2] In its December 13, 1988 supplement to petition for reconsideration, Ramapo notes that on July 3, 1984, the Bureau rescinded the grant of the renewal application of WBGO-FM in order to consider a prior filed conflicting application to upgrade the facilities of WMNJ(FM), Madison, New Jersey. The Bureau ultimately denied WMNJ's request for waiver of Section 73.509 of the rules, dismissed its modification application and re-granted WBGO-FM's application. Ramapo argues that the Commission

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

should similarly rescind the grants of the renewal applications of WFDU-FM and WBGO-FM pending final disposition of Ramapo's Section 73.509 waiver request in its modification application. In light of our action herein affirming the denial of Ramapo's request for waiver of Section 73.509, Ramapo's argument is moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 27, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GLASFORD TELEPHONE COMPANY PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On January 7, 1993, the Glasford Telephone Company (Glasford) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. According to Glasford, in March of 1988, MCI Telecommunications Corporation (MCI) requested that Glasford convert its end offices to equal access. Pursuant to Commission order, Glasford is required to complete the equal access conversion of end offices equipped with stored program controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). Glasford requests a thirty-three month extension to complete the conversion of its end offices to equal access.

Glasford states that it was not aware of MCI's request until March of 1991, when MCI contacted Glasford to ascertain the progress of Glasford's equal access conversion. Glasford believes that it may have overlooked the MCI letter because there was a change in management at Glasford. Glasford also states that it was unaware of Glasford's obligation to comply with the March 1988 request. Glasford states that after MCI contacted it again in 1992, Glasford discussed the issue with its counsel. Glasford states that it now understands its obligation to implement equal access. Glasford states, however, that its switch does not have equal access capabilities. Glasford states that it is in the process of negotiating with Northern Telecom on the price of a switch upgrade. Glasford states that if the price for a switch upgrade is too high, it will replace its existing switch. Glasford states that regardless of which option it selects, it will have the necessary equipment delivered, installed, and tested in time to convert to equal access by the end of December 1993.

Glasford therefore seeks an extension of thirty-three months, from March 1991 until December 1993. Glasford states that it has notified MCI of the proposed delay and MCI has no objection to the extension.

Interested parties should file comments on the petition by February 12, 1993, and reply comments by March 1, 1993, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Service, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from International Transcription Service, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORP.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-90-336

ORDER

Adopted: January 21, 1993; Released: January 28, 1993

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Litel Telecommunications Corp. (Litel) filed the above-captioned complaint against Southwestern Bell Telephone Company (Southwestern) seeking damages resulting from Southwestern's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On January 12, 1993, Litel filed a motion to dismiss the complaint stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting Litel's motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Litel's Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

5. IT IS FURTHER ORDERED that Litel's Application for Review filed in the above-captioned proceeding IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] Litel filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order*, 6 FCC Rcd 662 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
METROMEDIA LONG DISTANCE, INC.,
TELAMARKETING CORP. OF LOUISIANA, and
TOTAL-TEL USA,
Complainants,

v.

CINCINNATI BELL TELEPHONE COMPANY,
Defendant.

File No. E-91-159

ORDER

Adopted: January 21, 1993; Released: January 28, 1993

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Communigroup of K.C., Inc. (Communigroup) along with other complainants, filed the above-captioned formal complaint against Cincinnati Bell Telephone Company (CBT) seeking damages resulting from CBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On January 5, 1993, however, Communigroup filed a motion for partial dismissal requesting that it be dismissed from the complaint. In support of its motion, Communigroup states that it did not purchase sufficient interstate service from CBT to warrant continued litigation of the complaint.

2. We are satisfied that partial dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Communigroup's Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED to the extent it relates to the claims of Communigroup.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL TELEPHONE SERVICES, INC. File No. ENF-88-12

Petition for Declaratory Ruling that the Untariffed Payment of Commissions by Dominant Carriers to Customers Violates Section 203 of the Communications Act.

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1993; Released: January 28, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 20, 1988, National Telephone Services, Inc. (NTS), an operator services provider (OSP), petitioned the Commission to declare that commissions paid by dominant carriers to call aggregators[1] in exchange for the routing of "+0"[2] traffic to the dominant carrier must be tariffed under Sections 203(a) and 203(c)(3) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §§ 203(a) and 203(c)(3). On August 2, 1989, the Commission issued a public notice inviting comments on NTS's petition.[3] For the reasons discussed below, the petition is denied.

II. SUMMARY OF THE FILINGS

2. In its Petition, NTS argues that Sections 203(a) and 203(c) of the Act require dominant common carriers to tariff all "classifications, practices, and regulations affecting [their] charges." NTS's Petition at 3. NTS asserts that AT&T is dominant in the interstate telecommunications market and argues that as such, its payment of "0+" commissions is a practice which "affects" its tariffed charges and must be tariffed. *Id.* at 4. According to NTS, AT&T's "0+" commissions affect not only the charges to customers receiving the commissions, but also the charges to other switched service customers. NTS asserts that since commissions are designed to raise or preserve revenue, they directly affect the tariffed rate for all switched service customers within the meaning of Section 203. *Id.* at 4-6. NTS further argues that while all of AT&T's costs and expenses may have a general relationship to AT&T's tariffed rates, "0+" commissions are "special" and must be tariffed because they represent, "in marketplace terms, the outright purchase of traffic." *Id.* at 6. In the alternative, NTS urges the Commission to exercise its discretion pursuant to Section 203(a) of the Act to order AT&T to tariff its "0+" commissions so that the Commission can ensure that AT&T's practices do not violate Sections 201(b) and 202(a) of the Act, as unreasonable and unreasonably discriminatory practices. NTS contends that AT&T's commission payments vary from customer to customer, and argues that "only AT&T has the economic power to manipulate commission payments in such a way as to eliminate or control competition". *Id.* at 8.

3. OAN, Cleartel Communications, ITI, NY COM, and OSPA all support the petition. They argue in unison that commission payments to traffic aggregators are unlawful rebates under Section 203(c) of the Act.[4] OSPA and OAN contend that for purposes of determining whether a rebate exists, it does not matter that the call aggregator receiving the commission is not the customer for AT&T's "0+" service. What matters, they claim, is that AT&T is deviating from its tariffed rate.[5] In addition, OSPA states that the traffic aggregator determines which carrier is to handle the "0+" traffic and argues that, based on cases decided under the Elkins Act,[6] the party determining the routing of the traffic must be considered the owner for purposes of the rebate analysis. OSPA's Comments at 10-12. NY COM contends that AT&T's "0+" commissions and "1+" service[7] are closely linked and that "0+" commissions are used by AT&T to induce the delivery of "1+" traffic. NY COM concludes that since they are linked, AT&T's "0+" commissions affect AT&T's tariffed charges for both "1+" and "0+" services. NY COM's Comments at 1-5.

4. A number of parties oppose NTS's petition. AT&T argues that the payment of commissions to traffic aggregators in exchange for the delivery of undesignated "0+" traffic is standard procedure in the operator service business. AT&T's Opposition at 4-5. According to AT&T, commissions do not involve the provision of communications services or affect AT&T's rates for tariffed services. Rather,

---

[1] The Communications Act, as amended by the Telephone Operator Services Improvement Act ("TOCSIA"), Pub L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226), defines "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of premises, for interstate calls using a provider of operator services." 47 U.S.C. § 226(a)(2). Call aggregators include hotels, motels, airports, hospitals, private payphones, and others who control the space from which telephone service is offered to end users.

[2] "0+" calls or "non-sent paid calls," are placed by dialing "0" plus the called telephone number. 0+ calls include collect calls, calls billed to a third telephone number, and calls billed to telephone calling cards.

[3] In response, we received comments in support of the petition from Operator Assistance Network (OAN), Cleartel Communications, International Telecharge, Inc. (ITI), NY COM, Inc., and Operator Service Providers of America (OSPA). The following parties filed comments in opposition to NTS' petition: American Telephone and Telegraph Company (AT&T), the Ameritech Operating Companies (Ameritech), NYNEX Telephone Companies (NYNEX), Bell Atlantic telephone companies (Bell Atlantic) and Cincinnati Bell Telephone (Cincinnati Bell). Puerto Rico Telephone Company (PRTC) filed comments in support of the petition but only to the extent it applies to AT&T and not the local exchange companies. Reply comments were filed by NTS, OSPA, NY COM, Inc., AT&T, Ameritech and PRTC.

[4] OSPA's Comments at 4-12, OAN's Comments at 2-8, Cleartel's Comments at 4, NY COM's Comments at 4-5.

[5] OSPA's Comments at 7, OAN's Comments at 2-6.

[6] 49 U.S.C. § 41.

[7] 1+ calls are "sent-paid" calls, that is, calls that are billed to the line that originates the call.

AT&T contends, "0+" commission payments are ordinary business expenses and, as such, are not regulated under Title II of the Communications Act. *Id.* at 6-10. Moreover, AT&T states, there is "currently no instance in which AT&T's payment of "0+" commissions is ... linked to the provision of any AT&T service." Thus, it concludes, there is no basis for tariffing such commissions under Section 203 of the Act. *Id.* at 9.

5. AT&T disagrees that Sections 201(b) and 202(a) of the Act require that it tariff "0+" commission payments by emphasizing that all customers receive AT&T's services at nondiscriminatory tariffed rates and that the services are equally available through all telephones regardless of any commission payments. *Id.* at 11. Therefore, according to AT&T, commission payments to traffic aggregators do not raise any concerns about "unreasonable or unreasonably discriminatory practices" under Sections 201(b) and 202(a) of the Act. AT&T also maintains that all service providers incur commission expenses and that insofar as Sections 201(b) and 202(a) are found to apply to AT&T, they should apply to all operator service providers. AT&T maintains there is no basis to single AT&T out through the imposition of unique tariff filing restraints while leaving its competition unfettered in their commission practices. *Id.* at 13-14.

6. Bell Atlantic, Cincinnati Bell, Ameritech and NYNEX all oppose NTS' petition to the extent it would apply to dominant local exchange carriers. They argue, like AT&T, that commissions are a legitimate business expense for providing public telephone service and do not affect tariffed charges.[8] They contend that operator service providers should be free to compete on equal terms and argue that the imposition of tariff restrictions on local exchange carriers as well as dominant interexchange carriers such as AT&T would hinder competition and, consequently, be contrary to the public interest.[9] Bell Atlantic argues that the Commission already has adequate oversight, without a tariff requirement, since the Commission can disallow unreasonable or unjustified expenses and can resolve complaints brought by aggrieved parties under Section 208 of the Communications Act. Bell Atlantic's Opposition at 4.[10]

7. PRTC agrees with NTS that dominant interexchange carriers such as AT&T should be required to tariff their "0+" commissions. PRTC argues that only AT&T has the economic power to manipulate commission payments and eliminate competitors. PRTC maintains, on the other hand, that local exchange carriers should not be made subject to such a requirement. PRTC argues that local exchange carriers have traditionally paid telephone commissions which are a basic cost of doing business. PRTC's Comments at 2-4.

8. In its reply comments, NTS maintains that AT&T's "0+" commission payments affect tariffed rates within the meaning of Section 203 of the Act because they decrease the billed party's net charges. NTS argues that AT&T's commission payments flow through to the customer in the form of a reduction or elimination of the surcharge the hotel would have otherwise placed on the call or by lowering hotel room rates, "becoming the functional equivalent of direct cash payments to those parties." NTS's Reply at 4. NTS further argues that AT&T's commission payments to some traffic aggregators who receive "0+" calling capability for their customers, while other traffic aggregators presubscribe their telephone lines to AT&T and receive no such payment, is a privilege which must be tariffed under Section 203(c)(3) of the Act. *Id.* at 10-11. NTS argues that if commissions are to be paid to some premises owners, AT&T must pay them to all premises owners to avoid unreasonable discrimination and cross-subsidization among end users in violation of Sections 201(b) and 202(a). *Id.* at 11-12. NTS reiterates its claim that only AT&T has market power in operator services to unreasonably discriminate among customers. Thus, it concludes, only AT&T should be required to tariff its "0+" commission payments. *Id.* at 14-15.

III. DISCUSSION

9. At the outset, we note that commission payments to traffic aggregators for the delivery of "0+" traffic, a standard practice in the operator services industry, are a legitimate business expense. *See AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834 (Com. Car. Bur. 1988) (*Private Payphone Order*), *recon and rev. denied*, FCC 92-453 (released Nov. 4, 1992) (*Private Payphone Recon. Order*). In the *Private Payphone Recon. Order*, the Commission affirmed the Bureau's finding that, while the traffic aggregator is the subscriber for "0+" service for its premises, it is not the customer for purposes of a rebate analysis. *Private Payphone Recon. Order* at para. 8. Rather, the Commission stated, the customer for the "0+" service is the caller or the billed party ultimately responsible for the charges associated with the call. *Id.* In effect, commissions are paid by the operator service provider to traffic aggregators in return for the ability or right to receive "0+" traffic, which, unless otherwise specified by the customer, is delivered to the service provider by the aggregator through the presubscription process. In any event, service provided by a company other than the presubscribed carrier may be accessed by the customer by dialing the appropriate access code. Service provided by the non-presubscribed carriers would not be subject to the commission payments at issue in this proceeding.[11]

10. We have carefully reviewed the record in this matter and are not persuaded that AT&T is required to tariff its "0+" commission payments. Section 203(c) of the Act requires that carriers file with the Commission only the classifications, practices and regulations affecting their charges. Each customer pays the full tariffed rate and AT&T's services are equally available through all telephones regardless of any commission payments. *See AT&T Opportunity Calling and Lexicom, Inc. v. AT&T Communications, Inc.*, Mimeo No. 3628 (released April 4, 1985). NTS's argument that AT&T's commission payments are a unique expense and should be tariffed because they repre-

[8] Bell Atlantic's Opposition at 1-3, Ameritech's Opposition at 1-2, NYNEX's Opposition at 2-3, Cincinnati Bell's Opposition at 1-2.

[9] Bell Atlantic's Opposition at 3, Cincinnati Bell's Opposition at 2, NYNEX's Opposition at 4-5.

[10] *See also* Ameritech's Opposition at 4 and NYNEX's Opposition at 4.

[11] Under TOCSIA, compensation must be paid to aggregators in specified circumstances. *See* 47 U.S.C. § 226. The Commission has adopted a requirement that such compensation be administered through direct billing and/or arrangements between private payphone owners and OSPs. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation 7 FCC 2d 3251 (1992), *recon. pending.*

sent the outright purchase of traffic is without merit. As discussed above, the Commission has already concluded that the payments, which are for the delivery of otherwise undesignated traffic, are a legitimate business expense.[12]

11. In its *Private Payphone Recon. Order*, the Commission affirmed the Bureau's finding that AT&T's practice of tying its payment of "0+" commissions to the delivery of "1+" service constituted an unlawful practice under Section 201(b) of the Act. *Private Payphone Recon. Order*, at para. 16. The Commission agreed with the Bureau that by linking "0+" and "1+" service, AT&T, as a dominant carrier, would be restricting a customer's freedom of choice and, therefore, inhibiting competition. *Id.* In the instant proceeding, NY COM alleges, without evidentiary support, that AT&T has effectively violated the Commission's ruling by continuing to package its "0+" commissions with its "1+" service. Significantly, however, neither NY COM nor any other party has provided evidence in this proceeding that would support NY COM's allegations of unlawful packaging or tying. Absent such evidence, we find no merit in NY COM's claims.

12. Nor has evidence been presented in this proceeding to persuade us to depart from our previous ruling, upheld by the Commission in the *Private Payphone Recon. Order*, that AT&T's commission payments do not constitute unlawful rebates under Section 203(c) of the Act. As the Commission noted in the *Private Payphone Recon. Order*, it is clear that under AT&T's commission plan, the customer pays the full tariffed rate. Moreover, there is no apparent financial relationship between the customer and the private payphone company receiving the commissions such that the customer is paying less than the tariffed rate. *Id.* at para. 10. Here, NTS alleges without factual support, that the commission payments indeed flow through to the customer in the form of a reduction or elimination of, for example, hotel surcharges on the call or other hotel accommodations. These adjustments, according to NTS, become "the functional equivatent of direct cash payments" to the call aggregators' customers. NTS Reply at 4. We find NTS's allegations to be speculative at best. There is no persuasive evidence that value of any kind passes through the call aggregator to the "0+" customer in connection with the commission payments. Accordingly, there is no basis for petitioner's claim that such commission payments are illegal rebates.

13. Similarly, there is no support in the record for OSPA's assertion that the call aggregator should be considered the owner of the traffic for purposes of a rebate analysis. OSPA relies principally on *United States v. Milwaukee Refrigerator Transit Co.*, 145 F. Supp. 1007 (C.C.E.D. Wis. 1906) (*Milwaukee Refrigerator*), a case decided under the Elkins Act, to support its claim that the traffic aggregator is the one that controls the traffic and, therefore, is the owner for purposes of determining whether there has been a rebate. In that case, the court found that "control of the traffic was as absolute in the refrigerator company as if it were owner...." *Id.* at 1012. *Milwaukee Refrigerator* is inapposite because in the case of "0+" service, the customer has the means to exercise ultimate control over his or her choice of carriers, either through 10XXX access, or if such access is not yet unblocked for technical reasons, through a carrier-specific 1-800 or 1-950 access number.[13] In other words, while the call aggregator presubscribes the premises phones to a particular carrier and "0+" traffic defaults to that carrier absent some affirmative act by the caller, the customer remains free to reach other interexchange carriers by use of the appropriate access codes.[14]

14. In sum, no basis has been provided to call into question the Commission's policies regarding commission payments to call aggregators. Nor do we find sufficient ground to impose unique tariffing requirements on AT&T which could hinder its ability to compete in the operator services industry.[15] As the industry continues to evolve, a primary goal of the Commission is to assure that consumers are able to make informed decisions about using a particular carrier's services in a competitive marketplace that is unhindered by unnecessary government regulations. Complaint proceedings initiated by aggrieved parties pursuant to Section 208 of the Act will enable the Commission to provide adequate oversight of AT&T's commission practices based on specific factual circumstances and obviate any need for a tariffing requirement.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Petition for Declaratory Ruling filed by NTS IS DENIED.

---

[12] No allegation has been made in the instant proceeding that the rates or amounts of AT&T's commission payments are excessive or otherwise unreasonable and thus should be disallowed as an operating expense.

[13] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 6 FCC Rcd 4736, 4744 (1991).

[14] TOCSIA directed the Commission to consider the unblocking of 10XXX access to non-presubscribed carriers. 47 U.S.C. § 226. The Commission subsequently required aggregators to unblock 10XXX access to non-presubscribed carriers by March 16, 1992. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991). This requirement was subsequently stayed, pending reconsideration of our blocking requirements. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 7 FCC Rcd 2146 (1992). On reconsideration, the stay was lifted effective six months from the release date of the reconsideration order, subject to the unblocking schedule established in the reconsideration order. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 7 FCC Rcd 4355 (1992).

[15] We note that TOCSIA requires OSPs to file informational tariffs which include information about their rates and charges, including commission payments, and any terms and conditions of service. *See* 47 U.S.C. § 226(h)(1)(A). TOCSIA's legislative history, however, makes it clear that the informational tariff filing requirement does not apply to dominant carriers such as AT&T. *See* S. Rep. No. 439, 101st Cong., 2nd Sess. 23 (1990).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section
1.80 of the
Commission's Rules

ORDER

Adopted: January 11, 1993; Released: January 28, 1993

By the Commission:

1. Congress recently amended section 503(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(6), to extend the statute of limitations for issuing forfeitures to broadcast station licensees. Pub. L. No. 102-538, 106 Stat. 3543, enacted October 27, 1992. The amendment extended the statute of limitations to encompass the entire current license term and clarified the meaning of the term "current license term." By this *Order*, we amend subsection 1.80(c)(1) of our rules, 47 C.F.R. § 1.80(c)(1), to reflect the amended statute.

2. In addition, we are taking this opportunity to make typographical corrections and updates to several citations to sections of the Communications Act contained in subsections 1.80(a)(3) and (a)(4) of our rules, and to update the forfeiture payment procedures in subsection 1.80(h) of the rules to state the correct address for submitting payments.

3. The change to subsection 1.80(c)(1) of our rules adopted herein merely restates in our rules the statutory language of 47 U.S.C. § 503(b)(6) and the changes to subsections 1.80(a)(3) and (a)(4) simply correct or update citation references that are not controversial and are matters in which the public is not likely to be interested. Therefore, the Commission for good cause finds that compliance with the notice and comment and effective date provisions of the Administrative Procedure Act (APA) is unnecessary for these amendments. *See* 5 U.S.C. §§ 553(b)(B), 553(d)(3). The change to subsection 1.80(h) of our rules is a matter of agency organization, practice or procedure. Accordingly, the notice and comment and effective date provisions of the APA do not apply. *See* 5 U.S.C. §§ 553(b)(A), 553(d).

4. Accordingly, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), IT IS ORDERED that 47 C.F.R. §§ 1.80(a)(3) and (a)(4), 1.80(c)(1), and 1.80(h) are AMENDED as set forth in the Appendix, EFFECTIVE upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 1, is amended to read as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. 47 C.F.R. § 1.80 is amended by revising paragraphs (a)(3), (a)(4), (c)(1), and (h) as follows:

Part 1 - Practice and Procedure.

Miscellaneous Proceedings

§ 1.80 Forfeiture proceedings.

(a) **Persons against whom and violations for which a forfeiture may be assessed.** A forfeiture penalty may be assessed against any person found to have:

* * * * *

(3) Violated any provision of section 317(c) or 508(a) of the Communications Act; or

(4) Violated any provision of section 1304, 1343, or 1464 of Title 18, United States Code.

A forfeiture penalty assessed under this section is in addition to any other penalty provided for by the Communications Act, except that the penalties provided for in paragraphs (b)(1), (b)(2) and (b)(3) of this section shall not apply to conduct which is subject to a forfeiture penalty under section 202, 203, 205, 214(d), 219, 220, 223, 364, 386, 506 of the Communications Act. The remaining provisions of this section are applicable to such conduct.

* * * * *

(c) **Limits on the time when a proceeding may be initiated.** (1) In the case of a broadcast station, no forfeiture penalty shall be imposed if the violation occurred more than 1 year prior to the issuance of the appropriate notice or prior to the date of commencement of the current license term, whichever is earlier. For purposes of this paragraph, "date of commencement of the current license term" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) pending decision on an application for renewal of the license.

* * * * *

(h) **Payment**. The forfeiture should be paid by check or money order drawn to the order of the Federal Communications Commission. The Commission does not accept responsibility for cash payments sent through the mails. The check or money order should be mailed to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-8

In the Matter of

Implementation of Section 4(g) of the
Cable Television Consumer Protection
Act of 1992

Home Shopping Station Issues

NOTICE OF PROPOSED RULEMAKING

Adopted: January 14, 1993; Released: January 28, 1993

Comment date: March 29, 1993
Reply comment date: April 13, 1993

By the Commission:

INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Cable Act").[1] In this proceeding we seek comment on the adoption of implementing regulations relating to stations that are predominantly utilized for the transmission of sales presentations or program length commercials ("home shopping stations") and issues regarding the carriage of such stations on cable systems.

2. Section 4 of the Cable Act of 1992 added a new Section 614(g) to the Communications Act of 1934, as amended, 47 U.S.C. Sec. 533(g), which requires the Commission to determine, regardless of prior conclusions, whether home shopping stations are serving the public interest, convenience, and necessity. That section further provides that the Commission shall consider in its determination the viewing of home shopping stations, other demands on the television spectrum now utilized by such stations, and the role of such stations in providing competition with cable home shopping services. The 1992 Cable Act further requires that if the Commission finds that these stations do serve the public interest, then it shall qualify them as local commercial television stations for the purposes of cable carriage. If the Commission finds that one or more such stations do not serve the public interest, then the Act requires that the Commission provide them with reasonable time to provide different programming.

BACKGROUND

3. A home shopping station presents programming that offers for sale a variety of goods or services, soliciting viewers to purchase such goods directly from the programmer. Between 1969[2] and 1984,[3] Commission policy precluded or discouraged home shopping station formats based on a perception that such formats "subordinate[d] programming in the interest of the public to programming in the interest of its salability."[4] Our elimination in 1984 of the guidelines on commercial matter for broadcast stations again made such formats permissible.[5] The Commission based this policy change on the assumption that viewer preferences and market forces would govern commercial loads and that stations would not survive economically if viewers were dissatisfied with the level of commercialization. The Commission also expressed its preference for direct viewer control over content through the reflection of their preferences in the market rather than governmental regulation of programming content.[6]

4. Under our current regulations, home shopping stations have the same fundamental obligation as other broadcast stations to provide programming that responds to issues of concern to their communities of license.[7] Similarly, with regard to serving the needs and interests of children, home shopping stations must comply with the same rules that apply to other television broadcast stations.[8] Moreover, the Commission traditionally does not take station format differences into account in formulating regulatory policy,[9] a practice that "reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion."[10]

DEFINITION OF STATIONS "PREDOMINANTLY UTILIZED FOR THE TRANSMISSION OF SALES PRESENTATIONS OR PROGRAM LENGTH COMMERCIALS"

5. The initial issue we must address and on which we solicit comment is how to identify the stations that are the subject of Section 4 of the 1992 Cable Act, i.e., stations that are predominantly utilized for the transmission of sales presentations or program length commercials. We could interpret the provision to refer to stations that devote more than a specific number of hours per day to a home shopping format. For example, the provision could apply to stations that devote more than eight hours per day (or a third of the broadcast day) between the hours of 6:00 a.m.

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[2] *Topper Corporation*, 21 FCC 2d 148 (1969).
[3] *Report and Order* in MM Docket No. 83-670 (*Television Deregulation*), 98 FCC 2d 1076 (1984).
[4] *Topper Corporation*, above, at 149.
[5] Since that time, approximately 100 broadcast television stations have affiliation agreements with the Home Shopping Network, a provider of home shopping programming.
[6] *Television Deregulation*, above, at 1101-05.
[7] *See Television Deregulation* at 1077.
[8] *See Memorandum Opinion and Order* in MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 5093, 5096 (1991), *recon. denied*, 7 FCC Rcd 3197 (1992) (*Policies and Rules Concerning Children's Programming*).
[9] *See generally Memorandum Opinion and Order* in Docket No. 20682, 66 FCC 2d 78 (1977) (*Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*), *rev'd sub nom. WNCN Listeners Guild v. F.C.C.*, 610 F.2d 838 (D.C. Cir. 1979) (en banc), *rev'd, F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (upholding Commission policy not to conduct renewal review of radio station's format change).
[10] *WNCN Listeners Guild*, above, at 596.

and midnight to a home shopping format. Alternatively, we note that we have sought comment in another proceeding on whether we should consider a channel to be "predominantly utilized" for home shopping purposes if more than 50 percent of its programming week consists of sales presentations or program length commercials.[11] Another option before us is to consider only the broadcast station's prime time programming. Commenters should address how to define, within the intent of Congress, the stations that are subject to this proceeding.

ARE HOME SHOPPING STATIONS SERVING THE "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY"

6. Current policy and the continued licensing and renewal of home shopping stations, as well as the proliferation of these stations and their nonbroadcast counterparts, reflect the Commission's assumption over the course of the last decade that stations of this type are operating in the public interest. Our task here, however, is to evaluate "notwithstanding prior proceedings" whether such stations are now serving the "public interest, convenience, and necessity." In making this judgment, the 1992 Cable Act directs us to consider three specific factors: (1) the viewing of home shopping stations by the public; (2) the level of competing demands for the spectrum allocated to such stations; and (3) the role of such stations in providing competition to nonbroadcast services offering similar programming. Thus, to assist in making the required public interest judgment, we seek comment on these three factors, as well as on other matters that may be helpful in resolving this issue. Such matters include, in particular, whether the assumptions underlying the deregulation of the commercial guidelines are still valid, and whether home shopping stations provide a needed or valuable service for people who either lack the time or the ability to obtain goods outside the home or who otherwise benefit from the type of marketing process involved. Commenters are also invited to submit information regarding how home shopping broadcast stations have been meeting their public interest obligations.

7. Turning to the first of the three enumerated factors, we seek comment on the viewing of home shopping broadcast stations. To the extent that data on the viewership (or "ratings") of such stations is not generally reported, we ask commenters how we can best determine the levels of viewership of home shopping broadcast stations. We have never before used a station's ratings as a factor to determine whether the licensee has met its public interest obligations. We therefore also request comments addressing the means and standards of weighing ratings to ascertain whether the public interest is being served. Should we interpret a high viewership for home shopping stations as an indication that they serve the public interest? If so, how, if at all, should we factor low ratings into the public interest determination? With what stations should home shopping station ratings be compared? For example, should the comparison be with stations of comparable age? We note that basing the choice of formats on ratings, which reflect the popularity of a program or format, could implicate difficult First Amendment concerns. Thus, we seek comment on the extent of the First Amendment and other public interest concerns raised by using viewership information, as well as approaches to that problem that may minimize those concerns.

8. The 1992 Cable Act also states that another factor which we should use in determining whether home shopping stations serve the public interest is the level of competing demands for the spectrum allocated to such stations. In this regard, we seek comment on whether the statute directs the Commission to consider the demands only of other television broadcasters or, more generally, those of applicants, permittees, and licensees in other services (such as land mobile and advanced television). We therefore ask commenters to discuss how we can use the competition for scarce spectrum to determine the utility of home shopping stations. We note that in accordance with Section 307 of the Communications Act of 1934, as amended, the licensees of home shopping stations, like those of all other television broadcast stations, must demonstrate every five years to the Commission that the public interest will be served by renewal of their licenses.[12] At such time, any party in interest can object to the renewal. Moreover, any party qualified to hold a Commission license can file a competing application against the renewal, giving it the opportunity to replace the existing licensee, should that be in the public interest. We ask commenters to address whether the existing Congressionally mandated license renewal scheme adequately takes into account the competing demands of television broadcasters for the television broadcast spectrum.

9. Another factor the Cable Act of 1992 requires us to use in analyzing whether home shopping stations are serving the public interest is their role in providing competition to nonbroadcast services offering similar programming. Two aspects of the competitive relationships involved appear to be implicated in addressing this statutory factor. First, broadcast licensees, unlike nonbroadcast programmers, are required to provide programming that responds to issues of concern to their communities of license and to comply with other regulations associated with the Commission's broadcast station license application and renewal process.[13] Nonbroadcast distributors of identical or similar programming are not subject to these obligations. Thus, with respect to this aspect of the competition between the broadcast and nonbroadcast services, commenters may wish to consider whether the broadcast services suffer from potential commercial disadvantages as a result of their Commission-imposed public interest obligations. Commenters also are invited to address whether a conclusion that broadcast home shopping stations are operating in the public interest and thus entitling them to local cable carriage is an appropriate response to any competitive disparity that may exist.

10. The second aspect of the competitive analysis engages the question of the public interest in providing cable subscribers with home shopping competitive options. Both the 1984 and 1992 Cable Acts have as fundamental purposes ensuring the widest possible diversity of information sources and services through cable television and other dis-

---

[11] *Notice of Proposed Rulemaking* in MM Docket No. 92-259 (*Broadcast Signal Carriage Issues*), 7 FCC Rcd 8055, 8062 (1992).

[12] 47 C.F.R. Sec. 73.1020(a).

[13] *See, e.g.* Sections 307 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 307, 309. *See also* 47 C.F.R. Sections 73.606 (allotment of television channels to particular communities) and 73.1125 (main studio rule).

tribution media. Thus, acting to ensure that cable subscribers and the public generally have access to competitive home shopping services would appear to be consistent with Congressional objectives. Some cable systems deliver more than one service containing home shopping and thus, at least with respect to these systems, an appearance of competition exists. However, such multiple services may not be fully competitive. For example, a cable operator may have either an ownership or a contractual interest in a nonbroadcast provider of home shopping programming. A contractual interest is created when a nonbroadcast home shopping programmer has its presentation carried by a local cable company and pays the cable operator a percentage of those sales that originate from certain addresses or zip codes. Under such an agreement, the cable operator has a direct financial stake in the success of the nonbroadcast home shopping programmer, and vertical integration is created by contract. We seek comment on whether cable operators with either ownership or contractual interests in nonbroadcast providers of home shopping programming have elected not to carry home shopping broadcast stations or have treated such stations less favorably than the nonbroadcast home shopping services with which they are affiliated. If so, we also seek comment on whether these decisions have resulted in stifling competition and reducing the viewing choices of the public. Given Congress' concern with both the efficiencies and the potential drawbacks of vertical integration,[14] we ask commenters how the Commission can best promote programming diversity and market competition in the context of the carriage of home shopping stations. We also request commenters to address whether we should distinguish between ownership and contractual relationships in our analysis.

11. Section 4(g)(2) of the 1992 Cable Act suggests the possibility that "one or more" home shopping stations may not be found to be operating in the public interest. While it is our tentative view that a generalized decision of broad applicability is appropriate, this provision of the Act indicates that, in certain circumstances, individual judgments as to specific stations may be warranted, rather than a general rulemaking judgment as to this class of stations as a whole. Thus, for example, the issue of alternative demands on the spectrum or the existence of alternative, nonbroadcast suppliers of home shopping programming may vary according to the region or market involved. We seek comment on whether such individualized reviews are contemplated or mandated by the Act, and by what process they might be reached, if warranted.

PROCESS FOLLOWING PUBLIC INTEREST DECISION

12. Section 4 of the 1992 Cable Act appears to contemplate two possibilities resulting from our public interest determination regarding home shopping stations: (1) home shopping stations are found to be operating in the public interest, and they become eligible for mandatory cable carriage; or (2) they are found not to operate in the public interest, and their operations are terminated or modified. A third possibility might be that such stations or some subset of them, although operating in the public interest in such a manner as to warrant continued authorization and renewal, would not warrant mandatory cable carriage. It appears that the language of the Cable Act of 1992 may preclude such a conclusion. Accordingly, we seek comment on whether this latter possibility is permissible under the 1992 Cable Act and, if so, what criteria we might use to distinguish those home shopping stations entitled to carriage.[15]

13. Depending on the public interest decision involved, certain transitional rules will be necessary. If home shopping stations are accorded carriage rights, it will be necessary to ensure that the process whereby those rights are activated are coordinated with the rules adopted in the general mandatory carriage and retransmission consent proceeding now in progress.[16] Should we find that all or some home shopping broadcast stations do not servex the public interest, the 1992 Cable Act directs the Commission to allow such stations a reasonable period within which to provide different programming. We seek comment on our options should we make such a finding. In addressing this issue, commenters should discuss the tension between having Commission licensees serve the public interest as soon as possible, and the potential difficulty of initiating wholesale programming changes to meet that requirement. We tentatively find that 18 months from the adoption date of such a *Report and Order* would be reasonable, and seek comment on this proposal.

ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

14. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same deadlines as comments on the other sections of this *Notice of Proposed Rulemaking*. However, such comments must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice of Proposed Rulemaking* and regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

---

[14] *See, e.g., Notice of Proposed Rulemaking* in MM Docket No. 92-264 (*Horizontal and Vertical Ownership Limits*), 58 Fed. Reg. 3523 (January 11, 1993). *See also Notice of Proposed Rulemaking* in MM Docket No. 92-265 (*Development of Competition and Diversity in Video Programming Distribution and Carriage*), 58 Fed. Reg. 328 (January 5, 1993).

[15] For example, such criteria might include: (1) the number of full power stations in the market available for carriage; (2) the amount of time the station dedicates to its home shopping format; (3) the number of home shopping stations within the market; (4) whether the cable operator carries or has an interest in a nonbroadcast provider of home shopping programming; or (5) some combination of the above or other factors.

[16] *Broadcast Signal Carriage Issues.*

B. Ex Parte

15. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

C. Comments

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before March 29, 1993, and reply comments on or before April 13, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, at the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

D. Paperwork Reduction Act Statement

17. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose no new or modified information collection requirement on the public.

E. Ordering Clause

18. Accordingly, IT IS ORDERED that pursuant to Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, this *Notice of Proposed Rulemaking* IS ADOPTED.

F. Additional Information

19. For additional information on this proceeding, contact Paul R. Gordon, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

1. **Reason for the Action:** The purpose of this *Notice* is to establish rules and regulations in accordance with the Cable Television Consumer Protection and Competition Act of 1992 relating to the development of carriage requirements for home shopping stations.

2. **Objective of this Action:** The Commission's goal is to provide notice and opportunity to comment to members of the public regarding the carriage of local home shopping broadcast stations by cable system operators, as required by Section 4(g) of the 1992 Act.

3. **Legal Basis:** Authority for the action proposed in this *Notice* may be found in Sections 4, 303, and 614(g) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 303, and 533(g).

4. **Description, Potential Impact, and Number of Small Entities Involved:** Approximately 11,000 existing cable systems of all sizes and approximately 100 home shopping broadcast stations may be affected by the proposal contained in this *Notice*.

5. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:** None.

6. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:** None.

7. **Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:** The purpose of this *Notice* is to seek comment on issues, including alternatives that would minimize the impact on small entities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TEXAS STATE TECHNICAL COLLEGE
Lubbock, TX — File No. BPLIF-901001DA

SHALLOWATER INDEPENDENT SCHOOL DISTRICT
Lubbock, TX — File No. BPLIF-910114DB

For Construction Permit and License in the Instructional Television Fixed Service on Channels A1, A2, A3, A4

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1993; Released: January 28, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Texas State Technical College at Amarillo (Texas State Technical) and Shallowater Independent School District (Shallowater), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels A1-A4 in Lubbock, Texas.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Texas State Technical and Shallowater. Texas State Technical is qualified to be an ITFS licensee. It is one of four campuses of the Texas State Technical College System, a two-year accredited institution of higher education, created by the Texas Legislature and offering courses in vocational-technical education. Texas State Technical proposes to serve its own enrolled students at various locations in Lubbock in addition to serving Lubbock high schools with programming for credit toward high school degrees. Accordingly, Texas State Technical is a qualified local ITFS applicant.[1]

3. Shallowater, a governmental organization engaged in the formal education of enrolled students and accredited by the Texas Education Agency, is also a qualified ITFS applicant. Shallowater proposes to serve schools within its own region, and is, therefore, also a local applicant.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

4. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants. Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

5. Under this comparative selection process, Texas State Technical and Shallowater are awarded points based on the following criteria:

Localism. Texas State Technical, located in Amarillo, approximately 110 miles from Lubbock, states that "in keeping with its statutory mandate" Texas State Technical "historically has been responsible for extension courses at locations in and around Lubbock, Texas."[3] Because Texas State Technical proposes to offer courses to its own enrolled students in Lubbock for credit toward an associate degree or certificate of completion, it is deemed local. *See* 47 C.F.R. §74.932, Note 1; *Instructional Television Fixed Service - Second Report and Order Recon. in MM Docket 83-523*, 59 R.R. 2d 1355, 1368 (1986). Shallowater also is

---

[1] Texas State Technical's application listed no receive sites located on its campus and indicated that it proposed to transmit programming to its own enrolled students. Consequently, pursuant to the staff's written request of June 16, 1992, Texas State Technical submitted information bringing it into compliance with Section 74.931(a)(1). That section requires that an applicant proposing to serve its own enrolled students solely at locations off campus name the degree or diploma for which the formal programming will be offered and describe how the courses will be administered at each site.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[3] The mission of the Texas State Technical College System is to "contribute to the educational and economic development of the State of Texas by offering occupationally oriented programs with supporting academic course work, emphasizing highly specialized advanced and emerging technical and vocational areas for certificates of associate degrees." Tex. Educ. Code Ann §135.01(b)(Vernon Supp. 1992).

entitled to four points for being a governmental entity serving the formal educational needs of schools within its jurisdiction.

Accreditation. Texas State Technical, accredited by the Southern Association of Colleges and Schools and applying within its jurisdiction, and Shallowater, accredited by the Texas Education Agency and applying within its jurisdiction, are each entitled to three points for accreditation.

Four-Channel Limitation. Neither Texas State Technical nor Shallowater is the licensee of, or has filed applications for, additional ITFS channels in the Lubbock, Texas area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 F.C.C. Rcd 5924 (1992). Texas State Technical's amended illustrative schedule, submitted on April 12, 1991, three days prior to the "B" cut-off date, indicates an average of 38.75 hours of formal educational programming per channel per week, while its programming grid indicates an average of 41 hours of formal educational programming per channel per week.[4] Thus, Texas State Technical is entitled to one programming merit point. Shallowater's illustrative schedule proposes an average of 15.75 hours of formal educational programming and 18.5 hours of non-formal ITFS programming per channel per week, while its programming grid proposes an average of 16 hours of formal educational programming and 18.25 hours of non-formal ITFS programming per channel per week. Thus, the schedule and grid both indicate a total of only 34.25 hours of ITFS programming per channel per week. Because that amount does not reach the threshold at which merit points are awarded, Shallowater is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither Texas State Technical nor Shallowater is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Texas State Technical is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing at least 21 hours of formal educational programming, for a total of 10 points. Shallowater is entitled to points for being local, for being accredited and for observing the four-channel limitation, for a total of nine points. Thus, the selectee is Texas State Technical.

OTHER MATTERS

6. Texas State Technical proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with United States Wireless Cable, Inc. (U.S. Wireless), three of whose provisions do not comply with the Commission's requirements for such leases. First, in the event that Texas State Technical and U.S. Wireless are unable to reach agreement on additional renewal terms, the lease provides for a six-month continued operation of U.S. Wireless on the licensed channels beyond the term of Texas State Technical's license term. This provision is inconsistent with the Commission's maximum term for excess capacity leases. *Instructional Television Fixed Service - Report and Order in Gen. Dockets 90-54 and 80-113*, 5 F.C.C. Rcd 6410, 6416 (1990). Second, although the lease provides for consultation with Texas State Technical regarding location of the transmission point, another provision gives U.S. Wireless unilateral authority to change this site. We view this as inconsistent with the responsibility of the ITFS licensee to ensure the adequacy of its service. *Second Report and Order*, 101 F.C.C. 2d at 90. Finally, the lease affords U.S. Wireless an impermissible amount of control with regard to the ITFS license in that Texas State Technical is obligated to assign its license "to any FCC qualified entity designated by [U.S. Wireless]." However, these provisions neither reflect on the applicant's basic or comparative qualifications nor preclude grant of an authorization. *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 F.C.C. Rcd 1472, 1473 (1987). Accordingly, Texas State Technical's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, there are no petitions to deny Texas State Technical's application, and we find Texas State Technical to be fully qualified.

7. Accordingly, IT IS ORDERED, That the application of Texas State Technical College (BPLIF-901001DA) IS GRANTED, subject to the condition that within 30 days from the date of this Order, Texas State Technical College submits to the Chief, Mass Media Bureau for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein. The application of Shallowater Independent School District (BPLIF-910114DB) IS DENIED.

8. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[4] Texas State Technical submitted a further amended schedule on July 17, 1992, adding ditto marks below some of the amended schedule's titles, thereby indicating these programs' lengths as one hour instead of 30 minutes, for a total of 41 hours of formal educational programming. However, we cannot consider this clarifying amendment, which would qualify Texas State Technical for two programming merit points, because minor amendments resulting in a comparative advantage must be filed prior to the "B" cut-off date, which was April 15, 1991. *Second Report and Order*, 101 F.C.C. 2d at 74. Even if Texas State Technical's second amendment were timely filed, its excess capacity lease with United States Wireless Cable, Inc., as filed prior to the "B" cut off date, does not provide for the transmission of more than 40 hours of ITFS programming per channel per week.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WHARTON INDEPENDENT SCHOOL DISTRICT File No. BPLIF-910613DC
Chalmers, TX

DAMON INDEPENDENT SCHOOL DISTRICT File No. BPLIF-911008DU
Brazoria, TX

BAY CITY INDEPENDENT SCHOOL DISTRICT File No. BPLIF-911009DA
Wharton, TX

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1, C2, C3, and C4

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1993; Released: January 28, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Wharton Independent School District (Wharton), Damon Independent School District (Damon), and Bay City Independent School District (Bay City), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels C1-C4 in the Wharton, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Wharton, Damon, and Bay City. All three applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students, and they are accredited by the Texas Education Agency. Although they all propose to serve students outside their districts, because they also propose to serve schools within their own districts, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Wharton, Damon, and Bay City are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency, is entitled to three points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in the Wharton area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 F.C.C. Rcd 5924 (1992). Wharton's illustrative schedule proposes an average of 24.375 hours of ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV

[1] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

of the application, we will consider the programming on Wharton's schedule as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 F.C.C. Rcd 7228 (1992). In contrast, its programming grid proposes an average of four hours of formal educational programming per channel per week.[3] Thus, Wharton is entitled to no programming merit points.

Both Damon's illustrative schedule and programming grid propose an average of 22.5 hours of formal ITFS programming per channel per week. Accordingly, Damon is entitled to one programming merit point.

The amended illustrative schedule and amended programming grid for Bay City, submitted on the "B" cut-off date, each propose an average of 41 hours of formal educational programming per channel per week. Thus, Bay City is entitled to two programming merit points.

E- and F- Channel Group Relocations. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels; therefore, none is entitled to the one point for such applicants.

Total. Wharton, Damon, and Bay City are each entitled to points: for being local, for being accredited, and for observing the four-channel limitation. In addition to these nine points, Damon's proposed average of 22.5 hours of formal educational programming per channel per week qualifies for one programming merit point, and Bay City's proposed average of 41 hours of formal educational programming per channel per week qualifies for two merit points. Thus, the selectee is Bay City.

OTHER MATTERS

5. Bay City proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931, and has submitted a copy of its lease with United States Wireless Cable, Inc. (U.S. Wireless). Several of that lease's provisions do not comply with the Commission's requirements for excess capacity leases. First, the lease provides for an initial term of not more than five years expiring five years prior to the expiration of Bay City's license expiration date. Thereafter, U.S. Wireless, but not the ITFS licensee, is entitled to extend the agreement for up to five successive terms of five years, constituting, in effect, a term of 30 years. In addition, in the event Bay City and U.S. Wireless are unable to reach agreement on additional renewals, the lease provides for a six-month continued operation of U.S. Wireless on the licensed channels. These provisions are inconsistent with the Commission's 10-year maximum for excess capacity leases. *Instructional Television Fixed Service - Report and Order in Gen. Dockets 90-54 and 80-113*, 5 F.C.C. Rcd 6410, 6416 (1990). Second, although the lease provides for consultation with Bay City regarding location of the transmission point, another provision gives U.S. Wireless unilateral authority to change this site. We view this as inconsistent with the ITFS licensee's responsibility to ensure the adequacy of its service. *Second Report and Order*, 101 F.C.C. 2d at 90. Finally, the lease affords U.S. Wireless an impermissible amount of control with regard to assignment of the ITFS license in that U.S. Wireless has the right to "secure a qualified entity to which [Bay City] must assign its license" in the event Bay City is unable to find a potential assignee. Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications nor preclude grant of an authorization. *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 F.C.C. Rcd 1472, 1473 (1987). Accordingly, Bay City's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, although a petition to deny Bay City's application was filed, it was later withdrawn.[4] We find Bay City to be fully qualified.

6. Accordingly, IT IS ORDERED, That the application of Bay City Independent School District (BPLIF-911009DA) IS GRANTED subject to the condition that within 30 days from the date of this Order, Bay City Independent School District submits to the Chief, Mass Media Bureau for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein. The applications of Wharton Independent School District (BPLIF-910613DC) and Damon Independent School District (BPLIF-911008DU) ARE DENIED.

7. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] Wharton's programming grid, which represents that there will be at least some formal educational programming, is sufficient to satisfy the programming requirements of Section 74.931(a).

[4] Damon filed and later withdrew a pleading captioned "Petition to Dismiss or Deny." However, it raised only procedural issues which subsequently became moot. Therefore, the pleading need not be further considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Application of

LEOSAT Corporation File No. 12-DSS-P/91(2)

For Authority to Construct
a Low-Earth Orbit Domestic
Satellite System

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1993; Released: January 28, 1993

By the Commission:

I. INTRODUCTION

1. LEOSAT Corporation (LEOSAT) requests that we reconsider our Order[1] dismissing its low-Earth orbit satellite application. LEOSAT requests reinstatement *nunc pro tunc* of its application as originally filed with the Commission. Alternatively, the company requests a waiver of Sections 1.1107 and 1.1114(a)(2) of the Commission's rules. Orbital Communications Corporation (ORBCOMM) and STARSYS Global Positioning, Inc. (STARSYS) have opposed LEOSAT's petition for reconsideration, and LEOSAT has replied. For the reasons set forth below, we deny LEOSAT's requests.

II. BACKGROUND

2. By Public Notice,[2] the Commission established a September 21, 1990 deadline for the submission of applications to provide low-Earth orbit (LEO) satellite services in the frequency bands below 1 GHz. On that date, LEOSAT submitted its above-referenced application, along with a filing fee of $4,100.00, to the Mellon Bank in Pittsburgh, Pennsylvania. Because LEOSAT's application was not accompanied by an FCC Fee Processing Form 155, it was returned to the company by the fee processing staff in accordance with Section 1.1107 of the Commission's rules.[3] On October 12, 1990, LEOSAT resubmitted its application with both the fee and the Form 155.

3. Three applicants to provide LEO services, ORBCOMM, STARSYS, and Volunteers in Technical Assistance (VITA), subsequently petitioned to deny LEOSAT's application, alleging that it was not timely filed. The Bureau agreed and dismissed LEOSAT's application for failure to meet the filing cut-off date.[4] LEOSAT now seeks reconsideration of this dismissal and requests reinstatement of its application *nunc pro tunc*. Alternatively, the company requests that the Commission waive Sections 1.1107 and 1.1114(a)(2)[5] of the Commission's rules and treat as properly submitted the LEOSAT application filed on September 21, 1990.

4. In support of its request for reinstatement, LEOSAT alleges that 1) LEO applications are not subject to the Communications Act's Schedule of Charges and therefore no fee form was required; 2) the Form 155 requirement was not properly implemented and is therefore not binding; 3) LEOSAT had insufficient notice of the need to file Form 155; and 4) use of a cut-off deadline in this instance was inappropriate and illegal.

5. In the alternative, LEOSAT argues that waiver of the rules under which its application was dismissed will serve the public interest because it 1) will permit the development of a "valuable new service," 2) will be consistent with both recent Presidential and Commission initiatives to reduce obstacles to small businesses, and 3) will not prejudice the other applicants in this proceeding.

6. In reply, ORBCOMM states that LEO applicants are required to pay fees, that Form 155 was properly promulgated, that LEOSAT had sufficient notice of the Form 155 requirement and that use of a cut-off in this proceeding was both appropriate and within the scope of the Common Carrier Bureau's delegated authority. ORBCOMM also asserts that the circumstances in this case are not sufficiently compelling to support a waiver of Commission rules.

III. DISCUSSION

A. Authority to Impose Fees

7. The Commission's fee program was originally mandated by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L.No. 99-272, 100 Stat. 82, 118-121 (the 1985 Budget Act). By this Act, the Commission was required to implement a fee program for the processing and regulation of activities associated with certain communications services. The 1989 Budget Act[6] amended the original Schedule of Charges, increasing the amount of fees to be charged by the Commission and creating new fees for other types of services. In accordance with these Congressional mandates, the Commission issued a series of Memorandum Opinions and Orders establishing and clarifying its fee program.[7] LEOSAT argues that neither Congress nor the

---

[1] LEOSAT Corporation, 7 FCC Rcd 2472 (Com.Car.Bur. 1992) (Dismissal Order).

[2] FCC Public Notice, Report No. DS-982 (released July 16, 1990) Report No. DS-985 (released July 25, 1990) (Cut-Off Notice).

[3] The Commission's rules expressly provide that feeable applications submitted without the Form 155 will be dismissed. *See* 47 C.F.R. §1.1107(a)(2).

[4] Dismissal Order, *supra*.

[5] Section 1.1114(a)(2) states that, for purposes of determining whether a filing is timely, the date of resubmission with the correct fee will be considered the date of filing. 47 C.F.R. §1.1114(a)(2).

[6] Omnibus Budget Reconciliation Act of 1989, Pub.L.No. 101-239, 101 Stat. 2106, codified at 47 U.S.C. §158(1989).

[7] Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947 (1987) (Fees I); Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd 5987 (1988) (Fees I Recon.); Establishment of a Fee

Commission intended that LEO applicants should pay application fees pursuant to this Schedule of Charges, and thus the company was not required to file a fee Form 155.[8]

8. LEOSAT alleges that the Commission's rules implementing the Congressional schedule of fees limit the fees for satellite applications to geostationary satellite space stations. Since LEOs are not geostationary and did not exist as a commercial service when the Commission first implemented its fee program, LEOSAT argues that the Commission did not intend to cover LEOs under the current Schedule of Charges. LEOSAT also alleges that, since the Congress is considering an amendment to the Schedule of Charges that will specifically address LEO satellites, Congress likewise did not intend to include LEOs in its original Schedule. We disagree.

9. The statutory Schedule of Charges is not limited to applications for geostationary satellites, but applies to all "space stations."[9] The Commission has explicit authority to interpret the Schedule of Charges and to establish rules and regulations to carry out this fee schedule.[10] Like the Congressional Schedule, the Commission's fee rules specifically apply to all applications for "space stations." Although the Commission's rulemaking orders referred to "geostationary" satellites when the Commission originally implemented the Schedule[11] , the Commission has never stated, or suggested, that space station fees would be inapplicable to future types of satellite applications, should they be filed. To the contrary, in its subsequent fee rulemaking proceedings, the Commission has squarely addressed whether LEO satellite applicants are, or should be, exempt from the current fee rules. In its Fees II Reconsideration Order, the Commission found that LEO satellite systems were not exempt from filing fees.[12] This determination stands as the authority on the subject of fees applicable to LEO systems.

10. Furthermore, the fact that Congress is considering refinements of certain aspects of the Schedule of Charges for satellite applications does not imply that LEO applications are not feeable. As discussed above, Congress intended that the Commission collect fees for all space station applications. That Congress may now wish to define the appropriate fee amount for these services in a more precise fashion has no bearing on the scope of its original mandate.

B. Notice of Form 155 Requirement

11. LEOSAT next argues that its application was subjected to a "letter perfect" standard that is invalid because the Commission failed to provide clear notice of the fee or Form 155 requirements, or the consequences of failing to file a Form 155. In support, LEOSAT refers to the Common Carrier Bureau's Cut-Off Notice that established the deadline for submission of LEO applications.[13] That Notice sets forth certain application filing requirements as grounds for dismissal but does not specifically state that applicants must also file a fee and the Form 155.

12. We are unpersuaded by LEOSAT's claim that the Bureau's Cut-Off Notice caused it to believe that all requirements for its application were contained in that Notice. The facts are to the contrary. Although the Cut-Off Notice made no mention of a fee, LEOSAT filed a fee with its application, as required by Section 1.1105 of the Commission's rules.[14] LEOSAT also mailed its application and fee to the correct lockbox location in Pittsburgh as required by the fee rules. Hence, LEOSAT's own actions demonstrate its awareness that the "four corners" of the Cut-Off Notice did not set forth all of the applicable requirements for an acceptable Commission filing.

13. Furthermore, as LEOSAT concedes in its Petition for Reconsideration, irrespective of its actual notice, the company had legal notice of the fee filing requirements, which were set forth in rules published in the Federal Register well before LEOSAT filed its application on September 21, 1990. LEOSAT also concedes that the fee rules are clear as to the consequences of failure to file a correctly completed FCC Form 155 with its fee. These requirements were published in both the FCC Record and the Federal Register before LEOSAT submitted its initial application.[15] In these circumstances, LEOSAT's argument that it was not afforded adequate notice of the FCC's fee requirements, and the penalties for noncompliance, is unconvincing and erroneous as a matter of law.

14. Nor does the precedent cited by LEOSAT support its allegation of insufficient notice. In *Salzer v. FCC*.[16] the Court found that applicant Salzer had not been afforded clear notice of when and how to amend its application to include required new information. In that instance, the required form was not yet available, the language of the underlying Memorandum Opinion and Order establishing the requirement was ambiguous and any further clarifying information had been presented by the Commission only in unofficial mimeo form. Here, the language of the Commission's Fees II Order was not ambiguous, the Form 155 was readily available to LEOSAT and the fee form regulation was presented officially to the applicant in the Federal Register and FCC Record. The Court in *Malkan FM Asso-*

Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990) (Fees II); and Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919 (1991) (Fees II Recon.).

[8] Section 1.1107(a)(2) requires the submission of a Form 155 only in those instances where a fee is prescribed by Sections 1.1102-1.1105 of the Commission's rules. 47 C.F.R. §§1.1102-1.1105.

[9] *See* 47 U.S.C. §158(g)(16).

[10] 47 U.S.C. §158(f).

[11] Fees I, *supra*.

[12] Fees II Recon., *supra*, at 5924 paras. 39-40. Prior to the Commission's decision, staff decisions also had consistently made clear that LEOs are subject to the satellite fee requirement. *See* Letter to Albert Halprin from Marilyn McDermett dated August 13, 1990 (waiving filing fees for the construction of all but two of the applicant's proposed LEO satellites); Letter to Raul R. Rodriguez from Marilyn J. McDermett dated February 6, 1991 (waiving filing fees for the construction of all but two of the applicant's proposed LEO satellites). We note that LEOSAT does not contend that it was unaware prior to the cut-off date that the fee requirement applied to LEO applications. Indeed, LEOSAT submitted a fee when it originally filed its application on September 21, 1990.

[13] Cut-Off Notice, *supra*.

[14] 47 C.F.R. §1.1105(16).

[15] *See* n.7, *supra*.

[16] 778 F.2d 869 (D.C.Cir.1985).

ciates v. FCC [17] held that an applicant had notice of specific antenna height requirements because of a single reference in a Federal Register publication to the fact that "[a]ntenna height is also limited in certain cases by international treaty..." In this instance, as in *Malkan*, the Commission's published rules put the applicant officially on notice that Form 155 would be required. The regulation published in the Federal Register stated concisely that a Form 155 would be required and exactly when it would be required. Indeed, unlike the applicant in *Malkan* which had to independently determine U.S. treaty obligations, LEOSAT had to look no further than the Commission's published rules to know exactly what was required of it.

C. Validity of Cut-Off Deadline

15. Contrary to LEOSAT's assertions, the Bureau's use of a cut-off deadline in this proceeding was both appropriate and within the scope of the Bureau's delegated authority. LEOSAT argues that the Bureau does not have authority to issue a cut-off deadline until the Commission expressly grants such authority. The converse is true. The Bureau has broad delegated authority to perform Commission functions, subject only to specific exceptions. The establishment of a cut-off deadline does not fall within any of these enumerated exceptions.[18] Indeed, use of filing windows is a common Commission procedure that does not present a "novel question of law, fact or policy."

16. Further, use of a cut-off deadline was proper in this instance. The Commission has wide discretion to adopt whatever procedures "will best conduce to the proper dispatch of business and to the ends of justice."[19] The Commission has exercised this discretion by often using cut-off procedures when processing satellite applications.[20] Applications for use of the electromagnetic spectrum for satellite services often propose innovative technologies and services. The use of cut-off deadlines for the submission of applications to use specific frequencies allows the Commission to consider a finite set of concrete proposals when formulating licensing and service rules. Until a group of applicants is defined, it is often not possible to determine what regulatory approach and technical requirements are appropriate. Further, without a cut-off, the Commission may find itself ready to establish rules for a new service and to license systems, and be forced by last minute, mutually-exclusive filings to delay this action. This would severely impede the availability of new satellite services to the public, especially given the two to three year construction period needed for space stations. Thus, use of cut-off deadlines is an appropriate regulatory action.

D. Procedural Challenges to the Fee Rule

17. LEOSAT argues that the Commission's fee rule requiring dismissal for failure to file a Form 155 was not promulgated in compliance with the Administrative Procedure Act because the rule was adopted without following notice and comment procedures. LEOSAT alleges that the rule is substantive and that such procedures were therefore required.

18. LEOSAT did not participate in the fee rulemaking proceeding by seeking reconsideration of the Commission's order adopting the rule requiring dismissal. Hence, its procedural challenge to the Commission's rulemaking decision is untimely filed. Further, even if LEOSAT has standing to raise this untimely procedural claim, the Commission, in its proceeding adopting the Form(155 rule, has already addressed and rejected the merits of similar procedural arguments. On reconsideration of its Fees II rulemaking order, the Commission concluded that the rule requiring dismissal for failure to submit the Form 155 is well within the ambit of procedural "matters that pertain to the FCC's internal administrative operations."[21]

E. Waiver Request

19. In the event that its application is not reinstated *nunc pro tunc*, LEOSAT argues that the unique circumstances of this filing justify waiver of certain fee rules. In support, LEOSAT claims that a processing technicality should not be used to deny the public the benefits of an innovative new service and that no other applicant will be prejudiced by this waiver.[22] LEOSAT also argues that a waiver is justified in this case because the rule is intended to streamline application processing, but the Commission has not begun processing the other applications. Finally, LEOSAT claims that the Commission has in the past granted waivers to applicants in other services that made errors in completing the Form 155.

20. Grant of a waiver of our rules is appropriate only if special circumstances warrant a deviation from the general rule[23] and such deviation will serve the public interest.[24] Generally, a waiver request must be consistent with the principles underlying the rule for which a waiver is requested.[25] For the reasons set forth below, we do not believe a waiver is appropriate in this situation.

21. Initially, LEOSAT has not shown that unique facts and circumstances distinguish its situation. The subject fee rules were set forth in both the FCC Record and the Federal Register months before LEOSAT tendered its initial filing.[26] The Form 155 was readily available prior to the company's filing. The fact that an applicant may not have sufficiently informed itself concerning published

---

[17] 935 F.2d 1313 (D.C.Cir.1991).

[18] *See* 47 C.F.R. §§0.291, 0.219.

[19] 47 U.S.C. §154(j). *See, e.g., FCC v. Schreiber*, 381 U.S. 279 (1965); *SEC v. Chenery*, 332 U.S. 194 (1947).

[20] *See, e.g.*, Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service, 54 R.R.2d 565 (1983). The 1991 amendments to Part 25 of the Commission's rules merely codified this long-standing practice of establishing filing windows for the submission of mutually-exclusive applications. Amendment of Part 25 of the Commission's Rules, 6 FCC Rcd 2806 (1991).

[21] *Fees II Recon., supra*, at 5929 n.5.

[22] In the final Report of the Below 1 GHz LEO Negotiated Rulemaking Committee, dated September 16, 1992, CC Docket 92-76, the three remaining applicants and LEOSAT state their mutual belief that future competitive entry is possible within the allocated frequencies. However, the parties also agree that the extent of that entry (*i.e.* the size and type of future system(s) that can be accommodated) cannot be determined absent actual operating experience in the bands. Therefore, it is not clear that acceptance of LEOSAT's application will not prejudice the existing applicants.

[23] *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C.Cir. 1990).

[24] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C.Cir. 1969).

[25] *City of Angeles Broadcasting, Inc. v. FCC*, 745 F.2d 656 (D.C.Cir. 1984).

[26] *See* n.7, *supra*.

agency regulations, or ignored these regulations through inadvertence, is not a unique circumstance justifying waiver.

22. Nor will waiver of our filing rules serve the public interest. The Commission has made clear that submission of the Form 155 is not a mere technicality. As reflected in the rules, the Form 155 requirement is of such importance to the administration of the Commission's fee program that it is a prerequisite to acceptance of an application. The purpose of the Form 155 requirement is not, as LEOSAT asserts, to enable the efficient processing of applications but to enable the efficient and cost effective processing of fees. With the expected three-fold increase in feeable applications occasioned by the new Schedule of Charges, the Commission sought to utilize the "most cost-efficient method of cash management in collecting fees" and "to ensure the rapid deposit of funds."[27] The new Form 155 requirement was a critical and necessary part of achieving these objectives, as it would make it possible for the lockbox bank to make the initial determination of whether the correct fee had been paid without reading the underlying materials and would permit the creation of a data base containing a complete record of payments.[28] Grant of a waiver in this instance will disserve the public interest by undermining the intent of the fee processing rules.

23. The Commission's interest in maintaining the integrity and efficiency of its fee collection program through strict enforcement of this requirement also is not outweighed by LEOSAT's claim that its application is special or unique. Such claims could be made by virtually any applicant and, if accepted, would vitiate the Form 155 requirement. In fact, LEOSAT's application is not particularly unique. Both ORBCOMM and STARSYS have proposed service options similar to those described by LEOSAT. Thus, dismissal of LEOSAT's application will not deny the public innovative service options. Accordingly, we conclude that a waiver is not justified.

24. Finally, we note that Commission precedent does not support LEOSAT's waiver request. LEOSAT failed entirely to file the Form 155, and in such circumstances the rules require dismissal.[29] The Commission has not waived this rule for any other applicant.[30] The instances of other "waivers" cited by LEOSAT are inapposite to its situation. The rules provide that applications submitted without a Form 155 "*will* be dismissed," but that improperly completed Forms 155 "*may* subject the...filing to dismissal." 47 C.F.R. §1.1107(a)(2) (emphasis added). The rules thus contemplate that, in contrast to cases in which the Form 155 is omitted altogether, the Commission may exercise its discretion with respect to defective completion of the form. The applicants that were allowed to correct their Forms 155 submitted forms with errors or omissions. The Commission did not have to waive its rules to allow amendment, because allowance of amendments is contemplated by the rule itself.

IV. CONCLUSIONS AND ORDERING CLAUSE

25. In sum, we do not believe, on reconsideration, that LEOSAT's application was improperly dismissed. Nor do we believe that LEOSAT has presented us with facts sufficient to support a waiver of our fee processing requirements.

26. Accordingly, IT IS ORDERED that the Petition for Reconsideration and Request for Waiver filed by LEOSAT Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[27] Fees II at 3561, para. 6.
[28] *Id.* at 3569, para. 22.
[29] *See* 47 C.F.R. §1.1107(a)(2).
[30] *See* Letter to Felix Lopez from Marilyn J. McDermett, dated May 20, 1992 (dismissing applicant that paid a fee but failed to submit Form 155 with its application); and Letter to Carol Kneightly from Marilyn McDermett, dated June 2, 1992 (dismissing applicant that paid the fee and submitted Form 155 to the wrong location).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

Application for Review of

SACRED HEART UNIVERSITY

For New FM Translator Stations for Selden, New York and Huntington Station, New York — File Nos. BPFT-910603TU and BPFT-920413TA

and

Applications of

SACRED HEART UNIVERSITY

For New FM Translator Stations for Ridge, New York and Noyak, New York — File Nos. BPFT-910603XU and BPFT-910603TV

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1993; Released: January 29, 1993

By the Commission:

INTRODUCTION

1. The Commission has before it an Application for Review filed by Sacred Heart University (SHU) seeking review of the Mass Media Bureau's (Bureau) dismissal of the above-referenced applications for Selden and Huntington Station, New York by letter dated September 30, 1992 from Larry D. Eads, Chief, Audio Services Division (*Bureau Decision*).[1] SHU requests reversal of the *Bureau Decision* and grant of these translator applications.[2] For the reasons set forth below, SHU's Application for Review will be granted.

BACKGROUND

2. As part of its applications, SHU requested a waiver of Section 74.1235 of the Commission's rules to permit it to operate the translators at 250 watts effective radiated power (ERP). At the antenna height above average terrain (HAAT) proposed, the rule limits maximum power to 10 watts ERP. In adopting the 10 watt limitation in 1990, the Commission stated that it would be favorably disposed to permit up to 250 watts ERP at any HAAT, if the applicants demonstrate that the additional service reaches *only* "white area." For NCE translators, the Commission decided that any area not served by a "full-service public radio station" would be construed as a white area even if there is a full-service commercial station serving the area. *See Report and Order* in MM Docket 88-140, *Amendment of Part 74 of the FM Commission's Rules Concerning Translator Stations (Report and Order)*, 5 FCC Rcd 7212 (1990) at 7227 (paras. 105-108), *recon. pending*. The Commission did not preclude waivers of the power/height limits in situations involving less than 100% white area coverage where the public interest would be served. *Id.*

3. In support of its waiver request, SHU argued (1) the ERP limitation of Section 74.1235 should not apply to NCE translators; (2) it is not economically feasible for SHU to build a tower to serve only white area and SHU made the best technical proposal possible to serve the two white areas; (3) the Seldon and Huntington Station translators would not only provide first NCE service to 38,859 persons out of the 859,345 people in the translators' primary service contours,[3] but would also provide National Public Radio (NPR) for the first time to a large population on Long Island; and (4) grant of the Selden and Huntington Station (and Ridge) translators would facilitate settlement of two comparative hearings involving SHU, LIU, SUNY and CPB (MM Dockets 91-157 and 91-206) for NCE service on Long Island. In denying SHU's waiver request, the Bureau concluded that SHU failed to establish that the public interest would be best served by waiver of the ERP limitation of Section 74.1235 in this instance, particularly in view of the fact that SHU proposed first service to less than five percent of the population and 17 percent of the area served by the two translators. Furthermore, the Bureau found that while it is in the public interest to settle pending litigation, this is not sufficient to justify a waiver. *See Bureau Decision, supra.*

Application for Review

4. In seeking review, SHU first argues that grant of its waiver request would not undermine the policies underlying the translator rules. According to SHU, the Commission's power limits were imposed to prevent interference, and, to a lesser extent, to prevent unfair competition by limiting the distance of FM translator coverage contours. It contends that the Commission's concerns do not apply here because SHU's request complies with the Commission's interference criteria and there would be no unfair competition involving the NCE-FM service proposed. SHU asserts that no licensee, commercial or noncommercial, has opposed its applications. In fact, the NCE-FM licensees most affected by SHU's proposed translators, namely LIU, SUNY and CPB, fully support the grant of SHU's translator applications. SHU also notes that National Public

[1] Long Island University (LIU), State University of New York at Stony Brook (SUNY) and Connecticut Public Broadcasting (CPB) join in the application for review, pursuant to Section 1.115(c) of the Commission's Rules, as aggrieved parties.

[2] SHU also requests that the Commission grant related applications for FM Translator Stations at Ridge, New York (BPFT-910603XU) and Noyak, New York (BPFT-910603TV).

[3] In addition, the Ridge and Noyak translators would provide first NCE service to 97,664 persons.

Radio, the National Association of College Broadcasters, Eastern Public Radio and members of Congress who represent the area also support grant of the applications.

5. SHU also argues that grant of the translator applications would serve the public interest because they are part of a larger plan to provide much needed NCE service to Long Island. SHU, LIU, SUNY and CPB have been involved in two separate comparative hearings for full-service NCE facilities on Long Island for several years.[4] In order to resolve the conflicts, and to bring new and expanded NCE-FM service to the listening public, the parties entered into a settlement agreement in August, 1992.[5] SHU asserts that it is in the public interest to settle comparative hearings. The "key" to implementing the agreement, according to the applicants, is SHU's ability to achieve its desired coverage on Long Island with its NCE-FM translators in lieu of the full-service NCE-FM channels at issue in the comparative proceedings.

6. SHU asserts that grant of its translator applications and the full-service applications involved in the settlement agreement will result in first, nonduplicated NCE-FM service to 159,490 people and additional NCE-FM service to 1,299,543 people on Long Island. Furthermore, SHU notes that Congress has declared that it is in the public interest to make NCE-FM service available to all citizens and that the National Telecommunications and Information Administration (NTIA) has identified Long Island as an area with "approximately 18 percent" of New York state's NCE unserved population. *NTIA, Public Broadcasting in the United States*, at 445 (1989). Thus, SHU concludes that its translator applications should be granted.

DISCUSSION

7. SHU's translator applications and settlement of the two protracted comparative hearing proceedings present the Commission with a unique situation and an unusual opportunity to afford NCE service to unserved and underserved areas. While the focus in the *Bureau Decision*, the limited extent of white area service to be provided by the translators, might be appropriate in other situations, here the ERP waiver requests are part of a much larger effort to expand NCE service to Long Island, New York, an area with a significant underserved population. In addition to SHU's translator service, by virtue of the settlement agreement opportunities will be created for LIU and SUNY to upgrade their existing facilities and for SHU and CPB to construct new NCE-FM full-service stations. Without grant of SHU's translators, implementation of the settlement agreement will not occur, only two of the full-service facilities can be built or upgraded and new service to the public will be delayed. Grant of the Selden, Huntington Station, Ridge and Noyak translator applications will immediately provide first NCE service to 136,523 people. Although this may represent a small fraction of the listeners in the service area, it is a significant number. In addition, when the total settlement agreement, if approved, is implemented, SHU, LIU, SUNY and CPB will provide first NCE-FM service to 22,867 more people and additional NCE-FM service to almost 1.3 million others. Furthermore, settlement of contested comparative hearings can save valuable resources of both the Commission and noncommercial broadcasters, and expedite service to the public. *See Reform of the Commission's Comparative Hearing Process*, 6 FCC Rcd 157 (1990). Thus, in view of the total circumstances of this case, the Commission will reverse the decision of the Bureau and grant the applications.

CONCLUSION

8. In view of the foregoing, we find that grant of Sacred Heart University's Application for Review is in the public interest. Accordingly, IT IS ORDERED that the application for review, the request for waiver of Section 74.1235 of the Commission's rules, and the applications for construction permits to build new FM translator stations to serve Selden, New York (BPFT-910603TU) and Huntington Station, New York (BPFT-920413TA) are granted subject to approval of the settlement agreement in MM Docket 91-157 and MM Docket 91-206.

IT IS FURTHER ORDERED that the applications for Ridge, New York (BPFT-910603XU), and Noyak, New York (BPFT-910603TV) ARE GRANTED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[4] SHU and LIU are mutually exclusive applicants in MM Docket No. 91-206 in which (1) SHU proposes to construct a new station on Channel 202B1 (88.3 MHz) at Shirley, New York and (2) LIU proposes to modify the facilities of Station WPBX(FM), Channel 217A (91.3 MHz), Southampton, New York to specify operation on 88.3 MHz. SHU, LIU, SUNY and CPB are applicants in MM Docket 91-157, in which (1) SHU proposes to construct a new station on Channel 210B1 (89.9 MHz) at Noyak, New York; (2) CPB proposes to construct a new station on Channel 210A (89.9 MHz) at Southampton, N.Y.; and (4) SUNY proposes to modify the facilities of Station WUSB(FM), Channel 211B1 (90.1 MHz), Stony Brook, New York.

[5] With respect to MM Docket No. 91-206, the settlement agreement provides that (1) SHU will dismiss its Shirley application; (2) LIU will continue to prosecute its Southampton application; and (3) upon grant of program test authority to LIU on 88.3 Mhz, LIU will vacate 91.3 Mhz. With respect to MM Docket No. 91-157, the settlement agreement provides that (1) LIU will dismiss its Noyak application; (2) SHU will continue to prosecute its Noyak application; (3) SHU will request a waiver of the main studio rule (Section 73.1125) to permit SHU to locate its main studio outside the 60 dbu contour of the Noyak station; (4) SHU will request permission to directionalize its antenna to eliminate mutual exclusivity with SUNY's WUSB(FM); and (5) CPB will amend its Southampton application to specify operation on 91.3 Mhz, the channel to be vacated by LIU in MM Docket No. 91-206.

[6] The entire area of the proposed service for the Ridge, New York application is currently without NCE service and therefore the application clearly warrants waiver of the power limitation. We also note that the settlement agreement does not require grant of the Noyak translator application as a prerequisite to its implementation. However, since the Noyak translator will provide first service to 28,823 persons and SHU's application for a full-service NCE station at Noyak has not yet been granted, we feel that it is appropriate to grant the Noyak ERP waiver and application to initiate first NCE service to that white area as quickly as possible as part of the overall effort outlined above to expand NCE service on Long Island.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-4

In re Applications of

ATKINS BROADCASTING ("Atkins") — File No. BRH-900327UP

For Renewal of License of
Station KRGN(FM)
Amarillo, Texas

CAPROCK EDUCATIONAL BROADCASTING FOUNDATION ("Caprock") — File No. BRED-900327UQ

For Renewal of License of
Noncommercial Educational
Station KLMN(FM)
Amarillo, Texas

CAPROCK EDUCATIONAL BROADCASTING FOUNDATION ("Caprock") — File Nos. BMPED-890726IF, BLED-901210KD

For Modification of Construction
Permit and For License to Cover
Construction of Noncommercial
Educational Station KAMY(FM)
Lubbock, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. ("SEMFOT") — File No. BRED-900327UO

For Renewal of License of
Noncommercial Educational
Station KENT
Odessa, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. ("SEMFOT") — File No. BLED-910705KA

For License to Cover
Construction of Noncommercial
Educational Station KENT-FM
Odessa, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. ("SEMFOT") — File No. BPED-890313MD

For Construction Permit for a
New Noncommercial Educational FM
Station on Channel 290A at
Stanton, Texas

FAMILY STATIONS, INC.
Assignor

and — File No. BAPED-891130HR

SOUTHWEST EDUCATIONAL MEDIA
FOUNDATION OF TEXAS, INC.
("SEMFOT")
Assignee

For Assignment of Construction
Permit for Noncommercial
Educational Station KBTT(FM)
Bridgeport, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION ("SEMF") — File No. BLED-900226KA

For License to Cover
Construction of Noncommercial
Educational Station KOJO(FM),
Lake Charles, Louisiana

HEARING DESIGNATION ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 11, 1993; Released: January 29, 1993

By the Commission:

1. The Commission has before it for consideration the

above-captioned applications and materials related thereto[1] Because of substantial and material questions of fact concerning the qualifications of Atkins, Caprock, SEMFOT and SEMF, we will designate for hearing the applications for KRGN(FM), KLMN(FM), KAMY(FM), KENT/KENT-FM, and KOJO(FM). Also, in light of the serious questions raised about Atkins' qualifications, we will designate for hearing and consolidate in the aforementioned hearing, the applications for construction permit for a new FM station in Stanton and for assignment of the construction permit of Station KBTT(FM). *Transferability of Licenses*, 53 RR 2d 126 (1983); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1224 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991) ("*Character Policy Statement*"). Finally, until this proceeding is resolved, we will defer action on any future transfer of control or assignment application which proposes that Atkins or any entity controlled by him acquire a broadcast station.

ATKINS, CAPROCK, SEMFOT and SEMF

2. According to ownership reports filed with the Commission, Thomas Kent Atkins (also known as T. Kent Atkins, hereinafter referred to as Atkins) is the licensee of commercial Station KRGN(FM), Amarillo. Also, Atkins is president and a trustee, together with his wife, Mary Helen Atkins, of Caprock, a non-stock, non-profit educational trust. Likewise, Atkins is the president and a director with his wife of SEMFOT,[2] and he and his wife are directors of SEMF. Atkins and wife constitute the majority of the trustees of Caprock as well as the majority of the boards of directors of SEMFOT and SEMF. Atkins has signed all Caprock applications since becoming affiliated with it. Likewise, Atkins has signed all SEMFOT and SEMF applications.

3. In 1984, Atkins filed a construction permit application for a new commercial FM station on Channel 276A at Amarillo, Texas. In September 1987, he was granted a license for the station. Roughly contemporaneously, Caprock was seeking to obtain authorizations for two new stations. Specifically, in 1984, Caprock filed applications for a 620 watt noncommercial educational station in Amarillo, Texas and for a 640 watt noncommercial educational station in Lubbock, Texas. The Commission granted Caprock's applications in November 1986, and October 1987, respectively. During the pendency of Caprock's applications, Atkins was not affiliated with Caprock in an official capacity.

4. In December 1987, Atkins became president of Caprock. Atkins, his wife Mary, and an Atkins' acquaintance, Charles DeLap, became the sole trustees.[3] On March 21, 1988, Caprock filed an application to modify its construction permit for Station KLMN(FM) at Amarillo, citing the unavailability of the tower site specified in its construction permit. In support, Caprock submitted a letter from Panhandle Telcom, the tower's owner, which withdrew an outstanding offer for tower space. Similarly, on March 28, 1988, Caprock sought to modify the power and tower site of its construction permit for Station KAMY(FM) at Lubbock. As with the KLMN(FM) application, Caprock submitted a letter purportedly from Panhandle Telcom, withdrawing an outstanding offer for tower space. Both letters cited the same reasons -- the tower could not support additional weight and Caprock would cause interference to existing tenants -- for declining to make available tower space.

5. On May 11, 1988, before the Commission had acted on either modification application, Caprock notified the Commission that it would begin program tests on KLMN(FM), Amarillo. On June 20, 1988, Caprock filed its application for license to cover construction for KLMN(FM). Caprock certified in that application that the station was operating with facilities that were the same as those reflected in its construction permit. The Commission granted the application and issued the license for KLMN(FM) on January 3, 1989. The license specified the facilities for Station KLMN(FM) based on the facilities set out in Caprock's unmodified construction permit.

6. By telegram sent April 10, 1989, Caprock notified the Commission that it would begin broadcasting on Station KAMY(FM), Lubbock, in accordance with its construction permit. On April 13, 1989, Williams filed the first of several complaints and petitions that alleged that Caprock had constructed and operated the Amarillo and Lubbock

---

[1] The related pleadings include: (a) a petition to deny the renewal applications for KRGN(FM) and KLMN(FM) filed July 2, 1990, by Steven A. White; (b) a withdrawal of the petition to deny filed August 22, 1990; (c) a petition filed September 24, 1990, by Williams Broadcast Group ("Williams") seeking reconsideration of the grant of Caprock's above-captioned application for modification of the construction permit for Station KAMY(FM), Lubbock, Texas; (d) a petition to deny the license application for KAMY(FM) filed September 5, 1991, by Williams and pleadings related thereto; (e) the results of a Commission investigation concerning the operations of stations KAMY(FM), KLMN(FM), KRGN(FM), and KENT/KENT-FM; (f) a January 27, 1992, letter from the Chief, Enforcement Division, Mass Media Bureau to T. Kent Atkins; (g) Atkins' February 15, 1992, response; (h) a January 8, 1992, letter from Chief, Enforcement Division, Mass Media Bureau to T. Kent Atkins; (i) Atkins' January 27, 1992, response; (j) a January 29, 1992, letter from the Chief, Enforcement Division, Mass Media Bureau to T. Kent Atkins; (k) Atkins' February 15, 1992, response; and (l) the withdrawal of Williams' pleadings against Caprock's and SEMFOT's applications.

Also pending are applications to transfer control of Caprock from T. Kent Atkins and Mary Helen Atkins to James E. Still and Vera Jo Still (File Nos. BTCED-891003GF and BTCED-891003GG). We will defer action on these applications pending the outcome of the hearing on Caprock's qualifications. *See Western Cities Broadcasting Co.*, 5 FCC Rcd 6177, 6181 n.2 (MMB 1990).

[2] In addition to the applications noted already, SEMFOT has the following pending applications: File No. BPED-900629MJ, for construction permit for a new noncommercial FM station in Brownfield, Texas, and File No. BPED-900629MK, for construction permit for a new noncommercial FM station in Lubbock, Texas. The referenced construction permit applications are mutually exclusive with renewal of license applications; they will be processed accordingly, and, to the extent necessary, appropriate issues will be specified.

[3] Atkins formally reported these events to the Commission in August 1988. See File Nos. BTCED-880801HV (KLMN(FM)), BTCED-880801HW (KAMY(FM)), and BTCED-880801HX (KTDT(FM)). The Commission granted the three transfer applications on September 6, 1988.

stations in accordance with applications for modification of permits, not in accordance with the underlying permits. Caprock responded by requesting special temporary authority ("STA") to allow KLMN(FM) to operate at the transmitter site specified in its modification application purportedly because it had received a notice to vacate the tower site specified in its construction permit from the owner of the tower. The Commission granted this request on August 11, 1989. With respect to KAMY(FM), Caprock acknowledged that it commenced operations on KAMY(FM) from an unauthorized site.

7. In defending its unauthorized construction and operation of KAMY(FM), Caprock claimed that it mistakenly believed that it would lose its permit if it did not go on the air before it expired and that it could build the facility in accordance with the pending modification application. Caprock stated that it took the station off the air as soon as it became aware that its operation was unauthorized, that it notified the Commission of the commencement of program tests, and that it acted without consulting counsel. In addition, Caprock suggested that its unauthorized construction occurred because it had lost its original site.

8. In response, Williams charged that Caprock lied when it informed the Commission by telegram on April 10, 1989, that KAMY(FM)'s program test was in accordance with the construction permit. Williams further alleged that, despite Caprock's acknowledgement of unauthorized operation on KAMY(FM), Caprock continued to broadcast in accordance with its pending modification application for KLMN(FM), rather than its license, until one day after Williams' May 25, 1989, complaint to the Commission about KLMN(FM). Williams added that Caprock's operation of KLMN(FM), Amarillo, was also from an unauthorized site, namely, the one for Atkins' Amarillo station, KRGN(FM).

9. On July 26, 1989, Caprock filed an STA request for KAMY(FM). Caprock repeated that its originally specified tower site for KAMY(FM) was not available. Caprock also requested dismissal of its 1988 modification application, which Williams had challenged. In its place, Caprock filed another application to modify the KAMY(FM) construction permit. This latter application, which was not objected to, was granted August 13, 1990. Williams filed a petition for reconsideration of the grant of the KAMY(FM) construction permit on September 24, 1990, which Caprock opposed on October 9, 1990. On December 10, 1990, Caprock filed an application for license to cover construction of KAMY(FM), which Williams petitioned to deny on September 5, 1991.

10. On August 3 and 4, 1989, Commission personnel inspected stations KAMY(FM), KLMN(FM) and KRGN(FM). The inspection confirmed that Caprock had operated KAMY(FM) and KLMN(FM) in an unauthorized manner as alleged by Williams and as acknowledged by Caprock. The inspection also raised questions about Caprock's claims about the loss of the original antenna sites of KAMY(FM) and KLMN(FM). Specifically, Commission personnel could not locate the company which had supposedly informed Caprock of its need to relocate the two stations. The address given for the company appeared to be fictitious, while the telephone number appearing on the company's letterhead belonged to a car repair shop in Pampa, Texas.

11. When asked about these matters, Atkins admitted that Caprock constructed KAMY(FM) and KLMN(FM) in accordance with its modification applications prior to Commission authorization and that the letters submitted to justify the transmitter moves were fictitious. He claimed he constructed prematurely and began operation before receiving authority to do so because he mistakenly believed that the permits would be lost if Caprock did not put the stations on the air prior to the expiration of the permits. Atkins stated he prepared the fictitious letters because he could not locate the owners of the sites listed in the construction permits, and he was frustrated that Caprock could not reach its intended audience with the facilities authorized. Atkins did not address why he represented that KAMY(FM) and KLMN(FM) were operating pursuant to program test authority in accordance with their permits when, in fact, they were operating in accordance with then pending modification applications.

12. A March 9, 1990, inspection of stations KENT/KENT-FM, Odessa,[4] revealed that KENT-FM's antenna was located approximately 138 meters above the ground.[5] By comparison, KENT-FM's then valid construction permit called for an antenna height above ground of 87 meters at a location several miles distant from the location of the antenna found by the inspector. On May 1, 1991, in a pleading filed with respect to SEMFOT's application for a construction permit for a new FM station in Midland, Texas (File No. BPED-900629MM), a petitioner to deny alleged that KENT-FM was broadcasting without authority.[6]

13. Atkins claims the Commission was notified of the commencement of program tests on KENT-FM by telegram dated September 15, 1989, and that KENT-FM has broadcast pursuant to program test authority since that date. Atkins further claims that SEMFOT mailed to the Commission in November 1989 a license application for KENT-FM. However, the Commission's files contain no record of any such application. In addition, SEMFOT's June 1990 application for an extension of the KENT-FM construction permit makes no reference to a pending license application, and the Commission was not made aware that such an "application" existed until SEMFOT's attorney mailed a copy of it to the Commission in June 1991. Moreover, despite the questions raised about unauthorized broadcasts and the absence of a grant of its modification application, SEMFOT never ceased broadcasting over KENT-FM. It appears that SEMFOT has broadcast since September 1989 from the site and with the effective radiated power ("ERP") sought in its modification application despite the fact that that application was not granted until June 1991. Finally, despite the fact that its new permit and license application

[4] SEMFOT became the licensee of KENT on December 18, 1987, and the permittee of KENT-FM on August 1, 1989.

[5] This height was some 7 meters higher than what was sought in KENT-FM's then pending application to modify its construction permit, which application (File No. BMPED-880308MI) was granted June 21, 1991. By letter dated October 13, 1992, the Bureau directed SEMFOT to lower its effective radiated power so as to reduce the 1 mV/m contour to that authorized by its construction permit.

[6] SEMFOT's application for the new Midland FM station was dismissed on January 3, 1992.

show an antenna height above ground of 131 meters, SEMFOT acknowledges that the KENT-FM antenna is 138 meters above ground.

14. It is axiomatic that no one may operate a broadcast station without appropriate authorization from the Commission. *See* Section 301 of the Communications Act of 1934, as amended and Sections 73.277(b), 73.1620 and 73.1635 of the Commission's Rules; *cf. Data Investments, Inc.*, 6 FCC Rcd 4496 (1991). Also, it is clear that a broadcast station must operate substantially as set forth in its license. *See* Sections 73.1560 and 73.1745 of the Commission's Rules. Otherwise, the station is subject to revocation of license and/or imposition of a forfeiture. *See* Sections 312(a)(3) and 503(b)(1)(A) of the Communications Act of 1934, as amended. Further, construction of a station is prohibited until authorized by the Commission. *See* Section 319(a) of the Communications Act of 1934, as amended; *MCI Telecommunications Corporation*, 64 RR 2d 673 (1988).

15. Here, Caprock admits violating one or more of the Commission's Rules with respect to stations KAMY(FM) and KLMN(FM). Specifically, Caprock constructed and operated Station KAMY(FM), Lubbock at a location and with an ERP and height above average terrain ("HAAT") substantially different from what was authorized in its construction permit. Likewise, Caprock constructed and operated Station KLMN(FM), Amarillo at a location and with an ERP and HAAT substantially different from those authorized in the KLMN(FM) permit and license. In addition, Caprock admitted knowingly submitting fabricated letters to the Commission in order to justify the site relocations of stations KAMY(FM) and KLMN(FM).

16. SEMFOT has committed similar violations with respect to Station KENT-FM. SEMFOT broadcast on KENT-FM with facilities sought in its application to modify its construction permit, rather than those authorized by the permit, and it continued to broadcast, purportedly pursuant to program test authority, well after the time it should have filed a license application pursuant to Section 73.1620(a)(1). Having failed to file a license application within 10 days of beginning program tests, SEMFOT lost any authority it might have had to broadcast on KENT-FM.

17. In addition, we have concerns about the application SEMFOT submitted in June 1990 to extend the life of the construction permit for KENT-FM. Therein, SEMFOT sought an extension of time to complete construction of KENT-FM on the ground that it was still assembling equipment. It appears, however, that SEMFOT had begun broadcasting on KENT-FM some nine months earlier in September 1989 from facilities sought in an application to modify the very permit it was seeking to extend.

18. Misrepresentation involves false statements of fact while lack of candor involves concealment, evasion or other failures to be fully informative. Both represent deceit. The seriousness of either offense depends on the facts and circumstances of the particular case. Crucial to both is the existence of an intent to deceive. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Section 73.1015 proscribes misrepresentations or willful material omissions from licensees, permittees or applicants with respect to any application, pleading or other written statement submitted to the Commission.

19. Atkins has admitted in his February 15, 1992, response to the Commission's inquiry that Caprock's submissions concerning both KAMY(FM) and KLMN(FM) contain false statements of fact. Further, these filings appear calculated to mislead the Commission as to the real reasons for Caprock's unauthorized construction and operations. Similarly, SEMFOT's application to extend the KENT-FM permit appears to bear no relation to SEMFOT's actual intentions. It appears that SEMFOT was not endeavoring to construct the authorized facilities for KENT-FM but was in fact broadcasting over unauthorized facilities. Moreover, SEMFOT's later claim that it sent to the Commission in November 1989 an application for license to cover construction of KENT-FM is suspect since that application seeks to cover the facilities sought in the then pending modification application. SEMFOT's modification application was not granted until June 1991 and the Commission has no record of the 1989 license application. Inasmuch as the apparent misrepresentations of both Caprock and SEMFOT were made by Atkins, the licensee of KRGN(FM), we believe the qualifications of KRGN(FM) are also called into question as well as the qualifications of SEMFOT for the Stanton construction permit and the assignment of the KBTT(FM) permit and those of SEMF for the license for Station KOJO. *See Williamsburg County Broadcasting Corp.*, 5 FCC Rcd 3034, 3036 (1990); *Character Policy Statement, supra.*

White's Petition to Deny

20. On July 2, 1990, Steven A. White, filed a petition to deny the license renewal applications of Stations KLMN(FM) and KRGN(FM). White had previously submitted an affidavit in connection with Williams' petition to deny Caprock's application to modify the construction permit for Station KAMY(FM). The bulk of White's petition consists of matters which Atkins/Caprock have corrected. However, White also argued that Atkins violated Commission rules with respect to the operation of Station KRGN(FM) by extending the station's operating hours; broadcasting a carrier with no program material; not complying with the guidelines set forth for proper tower lighting; and failing to display the station's license. In addition, White alleged that Atkins paid his employees as independent contractors so as to avoid payment of social security taxes; that Atkins misrepresented KRGN(FM)'s ERP in contracts with agencies; and that Atkins paid bills for KENT out of the KRGN(FM) checkbook and then told KRGN(FM) listeners to send money for KRGN(FM)'s support.

21. Atkins did not respond to White's allegations. Instead, on August 22, 1990, Atkins submitted an affidavit from White in which White withdrew his petition and certified that he had neither been paid nor promised any consideration for the withdrawal of his petition. In view of the foregoing, Atkins filed on August 22, 1990, a "Statement for the Record" in which he submitted that White's petition is now moot and no response is required.

22. A petitioner to deny must demonstrate party in interest status and submit specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest. 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. Ltd. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1989); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). Even when a petition is withdrawn, the Commission will examine all materials before it to determine whether there is any substantial and material question of fact requiring resolution

in a hearing. *Cf. Michael D. Levine*, 6 FCC Rcd 855 (1991). We have done so and we find that White's allegations do not warrant addition of any hearing issues.

23. When the Commission inspected stations KRGN(FM) and KLMN(FM) in August 1989, and station KENT in March 1990, a number of apparent rule violations were noted. However, Atkins has submitted information indicating that the stations are now in compliance with those rules. Thus, with respect to White's claims that are covered by the field investigation, no additional action is necessary.

24. Moreover, with respect to White's other claims, we find that no additional hearing issues are raised since White has failed to allege sufficient facts to establish violations of the Commission's rules or policies or has otherwise failed to raise a substantial and material question of fact. Thus, White's allegation that Atkins extended the hours of Station KRGN(FM) and used remote control does not raise any questions about Atkins' operation of the station since all noncommercial educational FM stations are licensed for unlimited time operation except in cases of time sharing and a station may be operated by remote control so long as certain specified procedures are followed. Sections 73.561, 73.1400 and 73.1410 of the Commission's Rules. Similarly, White's allegations that the station broadcast a carrier with no program material, did not comply with guidelines for proper tower lighting, and fraudulently raised money over KRGN(FM) are too vague and conclusory to warrant further action. Finally, White's other claims pertain to non-FCC related misconduct which has not resulted in a conviction or finding by a competent forum that Atkins has violated any state or federal law. Accordingly, no hearing issue is raised. *Character Policy Statement*, 102 FCC 2d at 1204-05 (1986). Moreover, in light of White's withdrawal of his petition, we will not make him a party to the proceeding.

25. Accordingly, IT IS ORDERED, that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the captioned application of Atkins Broadcasting for renewal of license of Station KRGN(FM); the captioned applications of Caprock Educational Broadcasting Foundation for renewal of license of Station KLMN(FM), for modification of the construction permit of Station KAMY(FM), and for license to cover construction of Station KAMY(FM); the captioned applications of Southwest Educational Media Foundation of Texas, Inc. for renewal of license of Station KENT, for license to cover construction of Station KENT-FM, for construction permit for a new FM station in Stanton, Texas, and for assignment of the construction permit of Station KBTT(FM) from Family Stations, Inc.; and of Southwest Educational Media Foundation for license to cover construction of Station KOJO(FM) ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Caprock made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its application to modify the construction permit for Station KLMN(FM) (File No. BPED-880321IA).

2. To determine whether Caprock made misrepresentations of fact or was lacking in candor with regard to its May 1988 notification of program testing for Station KLMN(FM).

3. To determine whether Caprock made misrepresentations of fact or was lacking in candor with regard to its application for license to cover construction of Station KLMN(FM) (File No. BLED-880620KB).

4. To determine whether Caprock made misrepresentations of fact or was lacking in candor with regard to its May 1989 request for special temporary authority to move the transmitter site for Station KLMN(FM).

5. To determine whether Caprock made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its applications to modify the construction permit for Station KAMY(FM) (File No. BMPED-880328MM and BMPED-890726IF).

6. To determine whether Caprock made misrepresentations of fact or was lacking in candor with regard to its April 1989 notification of program testing for Station KAMY(FM).

7. To determine whether Caprock made misrepresentations of fact or was lacking in candor with regard to its July 1989 request for special temporary authority to move the transmitter site for Station KAMY(FM).

8. To determine whether SEMFOT made misrepresentations of fact or was lacking in candor with regard to its September 1989 notification of program testing for Station KENT-FM.

9. To determine whether SEMFOT made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its application to extend the construction permit of KENT-FM (File No. BPED-900608JD).

10. To determine whether Caprock violated Sections 301 and 319(a) of the Communications Act of 1934, as amended, and Sections 73.277(b), 73.1560(b), 73.1620, 73.1635, and 73.1745 of the Commission's Rules with respect to the construction and operation of Station KLMN(FM).

11. To determine whether Caprock violated Sections 301 and 319(a) of the Communications Act of 1934, as amended, and Sections 73.277(b), 73.1560(b), 73.1620, 73.1635, and 73.1745 of the Commission's Rules with respect to the construction and operation of Station KAMY(FM).

12. To determine whether SEMFOT violated Sections 301 and 319(e) of the Communications Act of 1934, as amended, and Sections 73.277(b), 73.1560(b), 73.1620, 73.1635, and 73.1745 of the Commission's Rules with respect to the construction and operation of Station KENT-FM.

13. To determine, in light of the evidence adduced pursuant to the specified issues, which, if any, of the captioned applications for stations KRGN(FM), KLMN(FM), KAMY(FM), KENT, KENT-FM, and KOJO(FM) should be granted.

14. To determine, in light of the evidence adduced pursuant to the specified issues, whether the captioned applications for the construction permit for a

new FM station in Stanton, Texas, and for assignment of the permit for Station KBTT(FM) should be granted.

26. IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the renewal applications for Stations KRGN(FM), KLMN(FM) and/or KENT and/or the license application for Station KENT-FM, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER FOR FORFEITURE in an amount not to exceed $250,000, shall be issued against Caprock and/or SEMFOT for willful and/or repeated violations of Sections 301 and 319(a) of the Communications Act of 1934, as amended, and/or Sections 73.277(b), 73.1015, 73.1620, 73.1635, and/or 73.1745 of the Commission's Rules, which occurred or continued within the applicable statute of limitations.

27. IT IS FURTHER ORDERED, that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

28. IT IS FURTHER ORDERED, that, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with respect to issues 1 through 12 shall be upon the applicant (Atkins, Caprock, SEMFOT, or SEMF as appropriate), and the burden of proof with respect to all issues shall be upon the applicant.

29. IT IS FURTHER ORDERED, that the petition to deny filed by Steven A. White IS DENIED TO THE EXTENT INDICATED AND IS OTHERWISE DISMISSED.

30. IT IS FURTHER ORDERED, that, to avail themselves of the opportunity to be heard, the applicants shall, pursuant to Sections 1.221(c) and 1.221(e) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

31. IT IS FURTHER ORDERED, that the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

32. IT IS FURTHER ORDERED, that the Secretary of the Commission send a copy of this Hearing Designation Order by *Certified Mail - Return Receipt Requested* to Atkins, Caprock, SEMFOT, and SEMF.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-317

In re Applications of:

MILFORD BROADCASTING CO. (hereafter "MBC") File No. BPH-911003MI

SHARON A. MAYER (hereafter "Mayer") File No. BPH-911004MG

For Construction Permit for a New FM Station on Channel 271C2 in Milford, Iowa

HEARING DESIGNATION ORDER

Adopted: December 30, 1992; Released: January 29, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary matter.* On November 13, 1991, Edward De Spain ("De Spain") filed an informal objection to Mayer's application alleging that Sharon Mayer is not financially responsible and would not be a competent custodian of the public trust. Specifically, De Spain alleges that, after Sharon Mayer and her husband purchased the De Spain family business in 1986, the Mayers defaulted on the purchase contract, and failed to pay their employees and creditors. De Spain's objection appears to be founded on a private contractual dispute. The Commission has consistently held that private disputes are beyond our regulatory jurisdiction and must be resolved in a local court of competent jurisdiction. *See John R. Kingsbery,* 71 FCC 2d 1173 (1979); *John F. Runner, Receiver (KBIF),* 36 RR 2d 773 (1976); *Transcontinental Television Corp.,* 21 RR 945 (1961). Therefore, the informal objection filed by Edward De Spain will be denied.

3. *Multiple Ownership.* David Protratz, a principal of MBC, claims a 10% ownership interest in KJJG(FM), Spencer, Iowa, and pledges to divest any attributable interest he may hold in station KJJG. Accordingly, in the event of grant of MBC's application, David Protratz will be required to come into compliance with 47 C.F.R. § 73.3555 prior to the commencement of program test authority.

4. *Financial.* Section III, Item 3 of FCC Form 301 (June 1989) requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. Mayer has not provided the address of the source of funds as requested in Item 3. Accordingly, Mayer must file an amendment which gives all the information required by Section III, Item 3 with the presiding Administrative Law Judge after this Order is released.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the informal objection filed by Edward De Spain IS HEREBY DENIED.

8. IT IS FURTHER ORDERED, That in the event of grant of MBC's application, David Protratz will be ordered to come into compliance with 47 C.F.R. § 73.3555 with respect to station KJJG(FM), Spencer, Iowa, prior to commencement of program test authority.

9. IT IS FURTHER ORDERED, That Mayer shall submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules,

[1] On August 31, 1992, the staff dismissed the application of L. Andy Kleven, BPH-911007ME, for failure to pay a hearing fee.

within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Complainants,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-89-390

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 22, 1993; Released: January 29, 1993

By the Chief, Formal Complainants and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1989, the Competitive Telecommunications Association, Inc. (CompTel), on the behalf of Litel Telecommunications Corporation (Litel), filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986. On January 13, 1993, however, CompTel filed a motion for partial dismissal requesting that Litel be dismissed from the complaint because Litel and SWBT have reached a mutually agreeable settlement of all pending controversies.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that CompTel's Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED to the extent it relates to the claims of Litel.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-311

In re Applications of

SALT CITY COMMUNICATIONS, INC. FILE NO. BPH-870918MN

D.J.'s BROADCASTING CO. FILE NO. BPH-870918MY

For Construction Permit for
New FM Station, Channel 290A,
Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1993; Released: January 29, 1993

By the Commission:

1. By this Memorandum Opinion and Order we grant Salt City's application for review, reverse the Review Board's disqualification of Salt City on a financial issue, *Salt City Communications, Inc.*, 7 FCC Rcd 4221 (Rev. Bd. 1992), and remand this proceeding to the Review Board for consideration of exceptions not previously considered. In his Initial Decision, Chief Administrative Law Judge Joseph Stirmer found that Salt City was financially qualified, and that its 100% integration proposal was qualitatively superior to that of D.J.'s Broadcasting. *Marc A. Albert*, 6 FCC Rcd 7160 (ALJ 1990).

2. To establish its financial qualifications, Salt City relies on a September 1987 commitment letter from Minority Broadcasting Investment Corporation (MBIC) pledging to "provide and assemble a $600,000 financing through a group of lenders." In crediting that commitment (as refined in 1990), the ALJ recognized that this exceeded MBIC's $300,000 lending limit, and that MBIC did not obtain advance commmitments for the balance of the loan from other sources.[1] Nevertheless, the ALJ found reasonable assurance because (1) MBIC proposed to syndicate the loan to other minority enterprise small business investment companies (MESBICs), which routinely participate in such financial arrangements; (2) MBIC has experience in assembling such loans; (3) MBIC's president, an expert in arranging minority financing, foresees no problem in financing MBIC's application; and (4) there was no affirmative evidence that MBIC could not complete the funding arrangements for Salt City. 6 FCC Rcd at 7175 ¶ 120.

3. The Board agreed with the ALJ that the terms of the proposed loan were adequately set forth in the September 1987 commitment letter, that Salt City was willing and able to accept those terms, and that the 1990 letter did not materially modify the terms of MBIC's commitment to Salt City. However, the Board, with Chairman Marino dissenting, found that, in the absence of evidence as to the other lenders' willingness to participate in the proposed loan syndication, Salt City did not have reasonable assurance of the entire commitment from MBIC. Having disqualified Salt City on the financial issue, the Board awarded the construction permit to DJ's Broadcasting, the only remaining applicant, without reaching the comparative issue or DJ's Broadcasting's contentions that misrepresentation and lack of candor issues should have been specified against Salt City.[2]

4. Both applicants have filed applications for review.[3] Various procedural motions have also been filed.[4] In addition, two amicus curiae briefs in support of Salt City's application for review are pending before us.[5] The amicus briefs urge that the Board erred in not crediting MBIC's commitment to syndicate the balance of the loan, but take

---

[1] A second letter was issued in 1990 which reduced the amount of the loan to $550,000, and made other minor refinements in the original understanding between MBIC and Salt City. The Board found, and we agree, that the second letter did not materially modify the original agreement. Thus, whether the amount of the loan is $600,000 or $550,000 has no bearing on the financial issue. For simplicity, we will refer to the original $600,000 figure.

[2] Two applications denied by the ALJ -- Taylor Communications of Syracuse and Marc A. Albert -- did not file exceptions to the ALJ's initial decision, and the Board dismissed their applications for failure to prosecute.

[3] In addition to the submissions listed in notes 4 and 5 below, the following pleadings are pending before the Commission: (a) an application for review, filed August 6, 1992, by Salt City Communications; (b) a contingent application for review, filed August 6, 1992, by DJ's Broadcasting Company; (c) an opposition, filed August 19, 1992, by DJ's Broadcasting; (d) a reply to contingent application for review, filed August 21, 1992, by Salt City; (e) a motion to strike DJ's Broadcasting's opposition, filed August 27, 1992, by Salt City; (f) an opposition to motion to strike, filed August 27, 1992, by Salt City; and (g) an opposition to motion to strike, filed September 1, 1992, by DJ's Broadcasting.

[4] Salt City has filed two pleadings relating to DJ's August 19, 1992 opposition to Salt City's application for review. First, Salt City claims in its August 27, 1992 "opposition to motion to strike" that DJ's Broadcasting's August 19, 1992 opposition contains a concealed motion to strike, which it opposes. However, we do not construe the opposition as a motion to strike the application for review. DJ's Broadcasting simply objected to Salt City's reliance in its application for review on cases not previously cited, and as set forth in note 9 below, we find that it was proper for Salt City to rely on these cases. Second, Salt City urges in its August 27, 1992 motion to strike that certain portions of DJ's Broadcasting's Opposition to application for review are procedurally deficient. In an opposition, filed on September 1, 1992, DJ's Broadcasting claims that Salt City's motion to strike is, in effect, an unauthorized reply to DJ's Broadcasting's August 19, 1992 opposition. In response, Salt City filed a reply on September 14, 1992. We agree that that portion of the opposition relating to the comparative issue -- a matter not addressed in Salt City's application for review -- is unresponsive and, in effect, impermissibly supplements DJ's Broadcasting's contingent application for review. Those portions of the August 19, 1992 opposition are therefore disregarded. We disagree, however, that other portions of the opposition so inaccurately characterize Commission precedent or the record as to exceed the bounds of permissible advocacy.

[5] First, Minority Broadcast Investment Corporation (MBIC) and National Association of Investment Companies (NAIC) filed a motion for leave to file and a brief amicus curiae on August

no position on the outcome of this comparative licensing proceeding. Given the complexity and public interest importance of the questions raised by Salt City's financial proposal, we believe that it would be helpful to consider the amici's views on this matter. We therefore permit them to participate as amici curiae and accept their amicus briefs.[6]

5. Based upon the pleadings before us, we agree with the Board that the 1987 commitment letter was not a mere accommodation letter, that the terms of the proposed loan were sufficiently identified in the 1987 letter, that those terms were accepted by both MBIC and Salt City, and that the terms were not materially modified by a subsequent letter issued in 1990. That portion of DJ's Broadcasting's contingent application for review making these arguments is therefore denied. We find, however, that, despite MBIC's legal lending limit and its failure to obtain advance commitments from other lenders, Salt City has always had reasonable assurance that MBIC is willing and able to arrange financing for Salt City, pursuant to its 1987 commitment letter. Having found Salt City to be financially qualified, we grant its application for review, deny in part DJ's Broadcasting's contingent application for review, and remand this case so that the Board may consider other exceptions relevant to the ultimate disposition of this proceeding that it did not address in its Decision.

I. BACKGROUND

6. Prior to certification, MBIC "confirm[ed] its present intention to provide and assemble a $600,000.00 financing, through a group of lenders which will be formed by MBIC as the lead investor." At that time, its lending limit was $300,000; now its limit is $400,000. Where a lender's commitment exceeds its lending limit, an applicant must make a "further showing of availability."[7] This requires more than "simply submitting evidence that the lead bank issuing the commitment letter is aware that the proposed loan will require the participation of other banks."[8]

7. The Board found the September 1987 commitment letter to be deficient under *KIST* because MBIC, despite its assurance that it could successfully syndicate the loan to other lenders, had not obtained advance commitments from other MESBICs or otherwise demonstrated its ability to fund the entire balance of the loan. 7 FCC Rcd at 4226 ¶ ¶ 23-25. It held that, without evidence of other lenders' agreements to provide that portion of the commitment exceeding MBIC's lending limit, Salt City had not made the "further showing of [the funds'] availability" required by *CBS*.

8. *Application for Review:* Salt City submits that *KIST* does not require its disqualification. Faced with a lending limit of $200,000, the *KIST* bank, which had no meaningful experience in syndicating loans to other lenders, had issued a $2,000,000 commitment letter. In contrast, MBIC's lending limit enabled it to fund at least 50% of the total loan, MESBICs routinely participate in the type of financing involved here, and MBIC is experienced in arranging such loans. Thus, Salt City argues that the facts show more than a mere awareness by MBIC of the need to secure the participation of other lenders.

9. Citing MBIC's experience in arranging this type of financing, Salt City also submits that the Board's decision is inconsistent with cases crediting financial commitments whereby the lender guaranteed only a portion of the loan but promised to use its best efforts to secure the balance of the loan from other sources. In finding reasonable assurance for those proposals, Salt City asserts, the Commission has relied on the lender's confidence that, based upon its knowledge of the financial market and its evaluation of the applicant's proposal, it would be able to secure the remaining financing from other lenders.[9] Thus, Salt City submits that it was arbitrary and capricious for the Board to dis-

---

21, 1992. DJ's Broadcasting filed an opposition on September 1, 1992. In response, MBIC filed a reply and Salt City filed comments on September 14, 1992. A second amicus brief in support of Salt City's application for review was filed on August 21, 1992 by National Association for the Advancement of Colored People, the League of United Latin American Citizens and the National Hispanic Media Coalition (NAACP). DJ's Broadcasting opposed NAACP's brief on September 1, 1992, urging that Salt City solicited the filing of the NAACP brief, and that it should be stricken as procedurally deficient. In reply, Salt City filed Comments on September 14, 1992, and NAACP filed an "opposition to motion to strike" on September 16, 1992, stating that it has no interest in the outcome of the comparative proceeding but that it is "extremely concerned about the *policy* implications of the Board's Majority decision." Third, the City of Syracuse Office of Minority Affairs (City) filed on August 21, 1992 a petition for leave to file and comments in support of application for review. In response, DJ's Broadcasting filed a motion to strike both pleadings on September 1, 1992, arguing that the "comments" pleading was a sham in that its filing had not been authorized by the City of Syracuse Office of Minority Affairs. On September 14, 1992, Salt City filed comments to the motion to strike. In view of the letter from attorney Erwin Krasnow to Donna Searcy withdrawing the City of Syracuse Office of Minority Affairs' August 21, 1992 pleadings, DJ's Broadcasting's motion to strike is moot and will be dismissed. In any event, we conclude, based upon Krasnow's letter stating that he prepared the brief at the request of the Director of the City Office and the statement under penalty of perjury from Salt City's principal, Merrill Charles, denying that he solicited the City's participation in this proceeding, that the filing was not improper or an abuse of process, as asserted by DJ's Broadcasting.

[6] We agree with DJ's Broadcasting that neither NAACP nor MBIC have met the requirements of 47 C.F.R. § 1.223 for formally intervening at this late stage of this comparative proceeding. We do not agree, however, that MBIC's loan commitment to Salt City creates a conflict of interest precluding its participation as an amicus curiae. We are not persuaded that, by virtue of its option to acquire non-voting stock in Salt City at the end of 3 years, MBIC is a party to this adjudicatory proceeding. In any event, we do not require that those seeking to participate as *amici curiae* must be entirely disinterested in the resolution of the issues that they raise. See, e.g., *Naguabo Broadcasting Company*, 6 FCC Rcd 912, 920 (Rev. Bd. 1991). DJ's Broadcasting urges that Salt City solicited the participation of NAACP et al., thereby compromising the impartiality of the decision-making process. However, such a solicitation is permissible under our rules, so long as all submissions are filed on the record. In this case, there was no prejudice to DJ's Broadcasting, which had an opportunity to respond to the amicus briefs, and has availed itself of that opportunity.

[7] *CBS, Inc.*, 49 FCC 2d 1214, 1228-29 (Rev. Bd. 1974).

[8] *KIST Corp.*, 99 FCC 2d 173, 178 ¶ 8 (Rev. Bd. 1984), modified, 102 FCC 2d 288 (1985).

[9] See *GAF Corporation*, 7 FCC Rcd 3225, 3229-30 ¶ 14 (1992) (reasonable assurance established where the lender was "highly confident" of its ability to complete arrangements for financ-

regard the assurance of MBIC's president, Walter Threadgill, an expert in financing minority applications through loan syndication, that the loan could be successfully syndicated. In its opposition, DJ's Broadcasting urges that Salt City's disqualification is mandated by Commission precedent, given MBIC's $300,000 lending limit and its undisputed failure to contact any other lender or loan syndicate partner before making the $600,000 commitment to Salt City.

10. *Amicus briefs:* NAACP and MBIC support Salt City's claims that neither *KIST* nor *CBS, Inc.* mandates its disqualification, and that the Board's decision conflicts with Commission cases finding reasonable assurance based on the confidence of an investment company experienced in raising funds for tender offers that the loan can be successfully syndicated to other lenders. Given MBIC's undisputed experience in arranging the type of financing involved here, as well as its history of never defaulting on a pledge to syndicate a loan with other MESBICs, the amici urge that the Board's decision is arbitrary and capricious. They predict that requiring advance commitments from the participating MESBICs, as well as from the lead MESBIC, will, as a practical matter, reduce the amount of capital available for minority broadcasters, contrary to the Commission's express interest in increasing investment opportunities for minority enterprises.[10] While DJ's Broadcasting opposes the amicus briefs on various procedural grounds, as set forth in notes 5-6, above, it has not addressed the merits of the amici's views.

II. DISCUSSION

11. Whether MBIC's commitment to syndicate the loan at the time of the grant of a construction permit, instead of making such arrangements prior to certification, is sufficient to establish reasonable assurance of financing is a close question. As set forth below, however, we find that, notwithstanding the absence of advance commitments from other MESBICs agreeing to share in the Salt City loan, MBIC's promise to arrange financing through loan syndication afforded reasonable assurance of the availability of the entire amount. We rely in this regard on record evidence that MBIC is experienced in loan syndication, the fact that MBIC (which has an unchallenged record of honoring all such commitments) followed its usual practice in extending the commitment to Salt City, and the absence of any evidence undermining MBIC's business judgment that it could successfully syndicate the loan upon the grant of Salt City's application.

12. As an initial matter, we agree with the ALJ that neither *CBS, Inc.* nor *KIST* mandates Salt City's disqualification. In *CBS, Inc.*, there was no indication that the bank extending a loan over its lending limit had contemplated and was willing to arrange for other banks to share in the loan, or that other banks would be willing to extend the necessary funds. There was therefore no reasonable assurance that the amount of the commitment over the bank's lending limit would be forthcoming. While the record in *KIST* reflected the lender's awareness of the need to solicit funds from other sources, it contained no meaningful evidence documenting the lender's ability to secure the remaining funds.[11] Whether the *KIST* bank had ever participated in syndicated loans was unclear.[12] Thus, the *KIST* applicant had not demonstrated that the bank had any special expertise that would have corroborated its ability to secure the balance of the loan from other lenders.[13] Under these circumstances, the bank's mere awareness that the proposed loan would require the participation of other banks was insufficient to provide reasonable assurance of the entire loan's availability, particularly in light of "evidence ... cast[ing] serious doubt that the [bank] had the resources to make the loan or was reliably committed to that loan (on its own or with likely correspondent banks)." *KIST*, 99 FCC 2d at 181 ¶ 10.

13. In contrast, the record in this case corroborates that, notwithstanding MBIC's lending limit and its failure to obtain advance commitments from other lenders, it is willing and able to arrange the entire $600,000 financing package upon the grant of Salt City's application, as promised in the 1987 commitment letter. A properly organized MESBIC, MBIC is in the business of financing qualified minority applicants. In order to extend loans over its legal limit, MBIC routinely serves as the lead MESBIC responsible for syndicating the balance of the loan with other MESBICs.

---

ing); *MacFadden Acquisition Corp.*, 104 FCC 2d 545, 567 (1986) (reasonable assurance found where the bank would provide 25% of the funding plus use its "best efforts" to obtain the rest from participating banks and the financial advisor was "highly confident" of bank financing). There is no merit to the suggestion that Salt City may not cite *MacFadden* for the first time in its application for review. DJ's Broadcasting relies in this regard on Section 1.115(c), which specifies that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." However, Salt City cites *MacFadden* to support an argument presented to the Board (i.e., that Salt City has reasonable assurance of the $600,000 commitment from MBIC notwithstanding MBIC's $300,000 lending limit), and thus it is properly the subject of an application for review. The rule does not prohibit such citation.

[10] *In the Matter of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 7 FCC Rcd 2654, 2656 ¶ 11 (1992).

[11] However, we reject the ALJ's suggestion that *KIST* is also distinguishable because there the $2,000,000 commitment required that a bank with a $150,000 lending limit secure $1,850,000, whereas MBIC was always able to fund at least 50% of the $600,000 commitment to Salt City. 6 FCC Rcd at 7175 ¶ 120. We agree with the Review Board that, whether MBIC must secure $300,000 or only $150,000 from other sources, neither is an insignificant amount of money. 7 FCC Rcd at 4226 ¶ 25. (MBIC's current lending limit is $400,000, and the amount of the loan was reduced to $550,000.

[12] On the one hand, a former member of the bank's senior loan committee testified that he was vaguely aware of one occasion in which the bank had participated in a syndicated loan. On the other hand, another member of the committee was unaware of any such involvement by the bank in loan syndication. Finally, a loan officer at the bank testified that she had no personal knowledge of any such loan syndication, but that she had been told by a senior official that the bank had approved loans in excess of its lending limit on three occasions. 99 FCC 2d at 179-81 ¶ 10. T

[13] The Board discounted the testimony of a bank official that he did not perceive any problem in arranging the loan syndication, noting that this testimony was premised on the applicant having a "good product" but that "whether the 'product' was 'good' was apparently never discussed" by the bank. *KIST*, 99 FCC 2d at 181 ¶ 10.

14. Not only is MBIC experienced in making such arrangements, but, as the ALJ found (6 FCC Rcd at 7175 ¶ 120), it is customary for MESBICs to participate in this type of financing. Before pledging to "provide and assemble a $600,000 financing" for Salt City, MBIC's president, Walter Threadgill, investigated the Syracuse radio market, and reviewed Salt City's lengthy written business plan as well as its principals' business backgrounds. Based upon that investigation, Threadgill was confident that the balance of the loan could be successfully syndicated upon the grant of Salt City's application.

15. Thus, in accordance with MBIC's customary practice, Threadgill did not contact other lenders before issuing the $600,000 commitment letter in September 1987. Threadgill explained that he would probably contact two or three other lenders about participating in the Salt City loan, but that he would not do so until after Salt City received a construction permit and actually needed the loan. In making the $600,000 commitment in 1987, Threadgill assured Salt City of MBIC's experience in assembling such financing and expressed his confidence in MBIC's ability to secure the participation of other MESBICs. As the ALJ noted, there is no affirmative evidence that would warrant disregarding the business judgment of Threadgill that the loan could be successfully syndicated in the future. In fact, there is no evidence, and DJ's Broadcasting does not claim, that any MESBIC, let alone MBIC, has ever failed to honor such a commitment in the past.

16. As in *GAF* and *MacFadden Acquisition Corp.*, the confidence of Threadgill as to MBIC's ability to successfully syndicate the entire loan combined with MBIC's expertise in arranging such financing affords reasonable assurance that, pursuant to MBIC's September 1987 pledge to secure the balance of the loan from other MESBICs, the entire $600,000 will be available for the construction and initial operation of Salt City's proposed station.

17. Those cases are not inapposite, as DJ's Broadcasting claims, merely because they involved the financing of tender offers for publicly held companies rather than comparative licensing proceedings in which the lender's commitment exceeded its legal lending limit. As an initial matter, *MacFadden* turned on whether the applicant had reasonable assurance of the necessary funds, which is the identical legal standard at issue here, and the basis for that finding was the bank's commitment for 25% of the necessary funding and a promise to use its "best efforts" to secure funding from other sources. 104 FCC 2d at 568. Clearly, to the extent that a lender agrees to lend only a portion of the requisite funds (and the remaining funds must be secured elsewhere), it is immaterial whether the lender is legally barred from extending the entire amount (as in the case of a bank or a MESBIC that is subject to a legal lending limit), or whether it has made a business judgment to pledge less than the full amount (as in the case of a investment company).

18. Nor is it critical that, in *GAF* and *MacFadden*, the Commission relied on the lender's confidence of its ability to raise funds over its lending limit without discussing, let alone overruling, the "further showing of availability" requirement set forth in *CBS, Inc.* As noted above, while the Board's reading of *KIST* and *CBS, Inc.* was not unreasonable, neither those cases nor, ultimately, the reasonable assurance standard requires the result reached by the Board. To the extent that the Board reads these cases as always requiring that applicants even in these circumstances must take "some additional step" to demonstrate reasonable assurance, 7 FCC Rcd at 4226 ¶ 25, that reading is, in our view, unduly rigid.[14] We emphasize, however, that our ruling is a narrow one: We find reasonable assurance only because the record demonstrates that MBIC is willing and, with near certainty, able to syndicate the loan with other MESBICs. In this respect, Salt City -- unlike the applicants in *CBS* and *KIST* -- has met its burden of disproving the ordinary assumption that funds in excess of the lender's limit will not be available, and there is no affirmative evidence undermining MBIC's ability to meet its commitment to arrange a $600,000 financing package for Salt City.

19. In finding Salt City financially qualified, notwithstanding the absence of advance commitments from other lenders, we note that our standard requires reasonable, rather than legal, assurance that the requisite funds will be available. We have been faulted by the court on occasion for requiring legal assurance "while at the same time ... profess[ing] to require something else," particularly if the applicant cannot obtain further assurance because the lender will not be more forthcoming until after grant of the construction permit. *Multi-State Communications, Inc.* v. *FCC*, 590 F.2d 1117, 1119-20 (D.C. Cir. 1978).

20. Here, it is undisputed that Salt City dealt with a properly organized MESBIC, that was experienced in funding minority applicants through loan syndication and that followed its usual practice in making a commitment to arrange the entire financing package without securing from other MESBICs advance commitments for that portion of the loan over its lending limit.[15] Thus, as in *Multi-State*, further assurance could not be obtained from MBIC until, upon the grant of Salt City's application, MBIC approached other MESBICs about participating in the loan.

21. The amicus briefs confirm that MESBICs, faced with limited funds, typically employ this type of arrangement, where an enterprise is financed by a group of investors that have pooled their funds under the direction of a lead investor. The amicus briefs further explain that the lead MESBIC generally waits until the grant of the permit before securing commitments for the balance of the loan. Unless MESBICs change their lending practices, the Board's decision would effectively preclude minority applicants from relying on MESBICs for financing. Yet, as the ALJ noted, there is no evidence that *any* MESBIC, let alone MBIC, has defaulted on a pledge to complete financ-

[14] We note that, to the extent that the Board treats *KIST* as black letter law requiring advance commitments from participating lenders, the Board indicated in *KIST*, 99 FCC 2d at 178-79 ¶ 8, that the "precedent relative to syndication loans may be written somewhat unevenly," citing *Washington's Christian TV Outreach*, 94 FCC 2d 1360, 1362-1364 (Rev. Bd. 1983), in which the Board had ordered a further remand so that the applicant could show, inter alia, that funds in excess of the bank's lending limit would be available.

[15] We have recognized that MESBICs have played a role in alleviating the credit difficulties often experienced by minority applicants because they lack the "lofty balance sheets necessary to qualify for conventional financing." *Initial Decision*, 6 FCC Rcd at ¶ ¶ 117, 120, citing *Storer Broadcasting Company*, 70 FCC 2d 709 (1979).

ing upon grant of the construction permit. While we rely on MBIC's demonstrated ability to raise the necessary funds in the future, we note that the finding of reasonable assurance turns on Salt City having secured MBIC's commitment at the time of certification and having demonstrated that the lender is willing and able to meet that commitment. Thus, our disposition of this case in no way departs from established precedent that an applicant may not certify its financial qualifications and then arrange financing.

22. In finding reasonable assurance we emphasize further that we have not, as DJ's Broadcasting claims, applied a less stringent financial standard here because Salt City is a minority applicant without the resources to obtain conventional financing. As the Board properly noted, the Commission has consistently refused to relax those standards for minority applicants, notwithstanding the obstacles that they often experience in securing adequate financing, and Salt City has not requested such special consideration.[16] Rather, our finding of reasonable assurance turns on the facts of this case which, as reflected above, indicate a near certainty that MBIC will be able to arrange a $600,000 financing for Salt City upon grant of its application. More definitive assurance is not required.

23. One final matter warrants comment. In dicta, the Board suggested that MBIC is not a financial institution. 7 FCC Rcd at 4225 ¶ 19. Fearing that this holding will subject applicants relying on MESBICs to additional litigation, Salt City urges that we clarify this matter. However, notwithstanding its determination that MBIC is not a financial institution, the Board properly applied the same financial standards that govern financial institutions, and it concluded that, but for MBIC's lending limit, Salt City's proposal satisfied current financial standards. Id. at 4225-26 ¶ ¶ 20-23. We clarify that, in accordance with our recognition that they have routinely and successfully financed minority applicants, MESBICs are not subject to different standards from other financial institutions.[17] Thus, it is not incumbent upon an applicant relying on a MESBIC to make any special showing as to the extent of the MESBIC's financial resources.[18]

24. Because the Review Board disqualified Salt City on the financial issue, it granted DJ's Broadcasting's application without considering exceptions faulting the ALJ for not specifying misrepresentation, and lack of candor issues against Salt City and for selecting Salt City as the comparatively superior applicant. Given our determination that Salt City is financially qualified, those questions must be resolved before we can make a public interest determination with respect to either DJ's or Salt City.

25. This is a routine comparative proceeding not requiring our special scrutiny at this time, and the Board, having reviewed the Initial Decision, is familiar with the record. It is therefore appropriate that we remand this case to the Board for consideration of those exceptions that affect the ultimate outcome of this proceeding that were not previously addressed by the Board.

III. ORDERS

26. ACCORDINGLY, IT IS ORDERED That the Motion for Leave to File Brief *Amicus Curiae*, filed August 21, 1992, by Minority Broadcast Investment Corporation and the National Association of Investment Companies (MBIC et. al) IS GRANTED and the attached Brief *Amicus Curiae* Filed In Support of Minority Enterprise Small Business Investment Companies IS ACCEPTED; that the Brief As Amicus Curiae In Response to Application for Review, filed August 21, 1992, by National Association for the Advancement of Colored People, the League of United Latin American Citizens and the National Hispanic Media Coalition (NAACP et. al) IS ACCEPTED; and that MBIC et. al and NAACP et. al MAY PARTICIPATE as *amici curiae*.

27. IT IS FURTHER ORDERED That the Motion for Leave to File Comments In Support of Application for Review, filed August 21, 1992, by The City Of Syracuse Office Of Minority Affairs and the attached Comments In Support Of Application for Review ARE DISMISSED pursuant to its request for withdrawal, and that the Motion to Strike, filed September 1, 1992, by DJ's Broadcasting Co. IS DISMISSED as moot.

28. IT IS FURTHER ORDERED That, pursuant to 47 C.F.R. § 1.115(g) of the Commission's Rules, the application for review, filed August 6, 1992, by Salt City Communications IS GRANTED to the extent reflected herein and DENIED in all other respects; that the Contingent Application for Review, filed August 6, 1992, by DJ's Broadcasting Co. IS DENIED in part and DISMISSED in all other respects;[19] that the Review Board's decision, *Salt City Communications, Inc.*, 7 FCC Rcd 4221 (Rev. Bd. 1992), IS SET ASIDE; and that the above-captioned proceeding IS REMANDED to the Review Board for further proceedings consistent with this decision.

29. IT IS FURTHER ORDERED That the Motion to Strike, filed August 27, 1992, by Salt City Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[16] 7 FCC Rcd at 4227-28 n.7, citing *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 n.5 (Rev. Bd. 1982).

[17] See, e.g., *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 7 FCC Rcd 2654, 2656 ¶ 11 & nn.16-19 (1992).

[18] See *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 ¶ 16 (1989).

[19] In view of our action remanding this proceeding to the Review Board for consideration of the comparative issue, those portions of DJ's Broadcasting's Application for Review relating to the ALJ's refusal to specify financial misrepresentation and real-party-in-interest issues against Salt City and the award of 100% quantitative credit for Salt City's integration proposal which have not been reviewed by the Board are not yet ripe for our consideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-298

In the Matter of

Amendment of the Commission's
Rules to Establish a Single AM
Radio Stereophonic Transmitting
Equipment Standard

NOTICE OF PROPOSED RULE MAKING

Adopted: December 10, 1992; Released: January 6, 1993

Comments Due: April 5, 1993
Reply Comments Due: April 20, 1993

By the Commission:

INTRODUCTION

1. By this action, the Commission is proposing to adopt a standard for stereophonic AM broadcast radio service, specifically, the Motorola C-Quam system. This proposal responds to Section 214 of the Telecommunications Authorization Act of 1992 (Authorization Act), which requires the Commission to adopt a single AM broadcasting stereo transmission standard.[1]

BACKGROUND

2. *Telecommunications Authorization Act.* On October 27, 1992, the President signed the Authorization Act into law. Section 214 of the Authorization Act states that the Federal Communications Commission shall -

> (1) within 60 days after the date of enactment of this Act, initiate a rulemaking to adopt a single AM radio stereophonic transmitting equipment standard that specifies the composition of the transmitted stereophonic signal; and
>
> (2) within one year after such date of enactment, adopt such a standard.

3. *AM Broadcasting Stereo Transmission Standards Developments.* In 1982 the Commission authorized AM stations to offer stereo service.[2] The Commission declined to select a single system standard from among the five competing AM stereo technical systems.[3] Rather, the Commission concluded that it would be more effective and efficient to allow market forces to determine the course of AM stereo development. Shortly afterwards, the field narrowed to two systems: Motorola's C-Quam system and the Kahn system.[4]

DISCUSSION

4. Of the approximately 660 US AM broadcasting stations that have converted to AM stereo, 591 use the Motorola system and an additional 37 use the Harris Corporation C-Quam compatible system.[5] Fewer than 20 stations now employ the Kahn system. Twenty-six receiver manufacturers incorporate the Motorola systempin at least one model; none incorporate the Kahn system. There are approximately 24 million Motorola C-Quam receivers currently in use by radio listeners. In the mid-80s, approximately 280,000 receivers were made that could decode both the Motorola and Kahn signals. These multi-mode receivers, however, are no longer produced. The Motorola system has been adopted as the national standard in six foreign countries: Canada, Mexico, Australia, Brazil, South Africa, and Japan. No countries have adopted the Kahn system.

5. The Authorization Act requires that we establish a single AM stereo standard. In light of the data presented above, particularly the figures regarding receiver types, we believe the public interest would be best served by adopting the Motorola C-Quam system as the U.S. AM stereo standard. Broadcasters, manufacturers and radio purchasers have, directly or indirectly, demonstrated strong preference for the Motorola system. Adoption of the C-Quam system as the AM stereo standard would eliminate the remaining uncertainty with regard to the AM technology broadcasters should employ and thereby serve to promote expansion of AM stereo transmitting equipment and a corresponding improvement in the quality of the AM service.

6. We believe that selection of an alternative to the Motorola system would set back the clock on the implementation of AM stereo service, to the substantial detriment of the public and broadcasters. Specifically, the users of the existing 24 million C-Quam receivers would no longer be able to enjoy AM stereo reception through that equipment. Also, existing AM broadcasters would forfeit their investments in C-Quam transmission equipment.

---

[1] *See* Telecommunications Authorization Act of 1992, Pub. L. No. 102-538. This proceeding is limited to issues involved in implementation of Section 214 of the Authorization Act. Other provisions of the Authorization Act are being addressed elsewhere.

[2] *See Report and Order* in Docket No. 21313, adopted March 4, 1982, 47 FR 13152.

[3] The developers of these AM stereo systems were Belar Electronics Corp., Harris Corporation, Kahn Communications, Inc./Hazeltine Corporation (the Kahn system), Magnavox Corporation, and Motorola Corporation.

[4] In 1988, the Commission reaffirmed its earlier decision not to select a standard. In that action, the Commission noted that the market appeared to be working towards establishing a *de facto* standard. *See Memorandum Opinion and Order*, 3 FCC Rcd 403 (1988).

[5] The statistics and other information cited herein are taken from testimony and comments to the Hearing before the Subcommittee on Communications, of the Committee on Commerce, Science, and Transportation, United States Senate, March 11, 1992, S. Hrg. 102-740. Copies of the relevant information is being inserted in the record for this proceeding. *See*, in particular, the Prepared Statement of Bruce Ladd, Vice President of Government Affairs and Government Relations, Motorola, Inc.

Further, we are aware that many AM broadcasters are struggling financially and may not be able to afford replacement stereo transmission equipment. Selection of an alternative stereo standard thus could conceivably result in discontinuance of the existing stereo service with no replacement. Such a result would be inconsistent with the legislative intent to advance AM stereo service. In light of these factors, proponents of alternative standards would bear a heavy burden to show that the potential benefits of an alternative technology outweigh the likely costs and delays of selection of a standard different than the Motorola system. Nevertheless, we invite comment on alternatives to the proposed standard.[6]

7. We are proposing to incorporate the Motorola C-Quam standard in Part 73 of our rules. The proposed standard is presented in Appendix B. We are also proposing to require stations that employ alternative AM stereo systems (*i.e.*, the Kahn and Harris systems) to discontinue such operation as of one year from the effective date of these rules.[7] Any stations converting to AM stereo after the effective date of these rules will be required to employ the system adopted by the Commission. Consistent with our general policies towards improvement of the AM broadcasting service, we will continue to encourage the availability of AM receivers, including AM stereo receivers, that meet appropriate quality standards.[8]

PROCEDURAL MATTERS

8. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

9. *Comment Information.* Pursuant to procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before April 5, 1993, and reply comments on or before April 20, 1993. Extensions of these time periods are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

10. *Regulatory Flexibility Act.* As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. Sections 601 *et seq.* (1981)).

11. *Additional Information.* For further information concerning this proceeding, contact David Means, Engineering Evaluation Branch, Office of Engineering and Technology, (301) 725-1585.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action. This proceeding is being initiated to select an AM radio stereophonic equipment standard, as required under Section 214 of the Telecommunications Authorization Act of 1992.

Objectives. The Commission's goal is to select an AM stereophonic transmission standard.

Legal Basis. Authority for this proposed rule making is contained in Section 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), and 303(r) and Section 214 of the Telecommunications Authorization Act of 1992, Pub. L. 102-538 (1992).

Reporting, Recordkeeping and other Compliance Requirements. AM stereo transmission equipment would require type acceptance by the FCC to demonstrate compliance with the proposed standard.

Federal Rules the Overlap, Duplicate or Conflict with Proposed Rule. None.

Description, Potential Impact, and Number of Small Entities Involved. This action is expected to expand the operation of AM stereo service & sales of AM stereo receivers. The effect of this proposal would be to necessitate conversion to use of the C-Quam transmission system by approximately 50 AM stations currently using the Kahn or Harris systems in order to continue to provide stereo service.

---

[6] We recognize that efforts are under way to develop digital broadcasting technologies for the AM broadcast band. The Authorization Act is clearly intended to address an AM stereo standard within the context of the current analog transmission format. Accordingly, AM digital broadcasting technologies are outside the scope of this proceeding.

[7] We understand that the Harris system may be compatible with the Motorola C-Quam system. We invite comment as to the extent of the compatibility and whether we should permit stations currently using the Harris system to continue to do so indefinitely.

[8] We are taking a similar approach with implementation of advanced television (ATV). See Advanced Television Systems, 7 FCC Rcd 3340, 3358 (1992). *Cf.* FCC Public Notice, Revised Patent Procedures of the Federal Communications Commission, Public Notice 13948, December 6, 1961.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives. None.

APPENDIX B

PROPOSED RULE CHANGES

I. Part 73 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 73 - RADIO BROADCAST SERVICES

1. The authority citation in Part 73 continues to read:

AUTHORITY: 47 U.S.C. 154, 303.

2. Subpart A is amended by revising section 73.128 to read as follows:

Section 73.128 AM Stereophonic Broadcasting.

(a) An AM broadcast station may, without specific authority from the FCC, transmit stereophonic programs upon installation of type accepted stereophonic transmitting equipment and the necessary measuring equipment to determine that the stereophonic transmissions conform to the modulation characteristics specified in paragraphs (b) and (c) of this section.

(b) The following limitations on the transmitted wave must be met to insure compliance with the occupied bandwidth limitations, compatibility with AM receivers using envelope detectors, and any applicable international agreements to which the FCC is a party:

(1) * * *

(c) Effective (insert date one year after enactment), stereophonic transmissions shall conform to the following additional modulation characteristics:

(1) The audio response of the main (L+R) channel shall conform to the requirements of the ANSI/EIA-549-1988, NSRC-1 AM Preemphasis/Deemphasis and Broadcast Transmission Bandwidth Specifications (NRSC-1).

(2) The left and right channel audio signals shall conform to frequency response limitations dictated by ANSI/EIA-549-1988.

(3) The stereophonic difference (L-R) information shall be transmitted by varying the phase of the carrier in accordance with the following relationship:

$$\phi_c = \tan^{-1}\left(\frac{m(L(t)-R(t))}{1+m(L(t)+R(t))}\right)$$

where:
L(t) = audio signal left channel,
R(t) = audio signal right channel,
m = modulation factor, and
$m_{peak}(L(t) + R(t)) = 1$ for 100% amplitude modulation,
$m_{peak}(L(t) + R(t)) = 1$ for 100% phase modulation

(4) The carrier phase shall advance in a positive direction when a left channel signal causes the transmitter envelope to be modulated in a positive direction. The carrier phase shall likewise retard (negative phase change) when a right channel signal causes the transmitter envelope to be modulated in a positive direction. The phase modulation shall be symmetrical for the condition of difference (L-R) channel information sent without the presence of envelope modulation.

(5) Maximum angular modulation, which occurs on negative peaks of the left or right channel with no signal present on the opposite channel (L(t) = -0.75, R(t) = 0, or R(t) = -0.75, L(t) = 0) shall not exceed 1.25 radians.

(6) A peak phase modulation of +/- 0.785 radians under the condition of difference (L-R) channel modulation and the absence of envelope (L+R) modulation and pilot signal shall represent 100% modulation of the difference channel.

(7) The composite signal shall contain a pilot tone for indication of the presence of stereophonic information. The pilot tone shall consist of a 25 Hz tone, with 1% or less total harmonic distortion and a frequency tolerance of +/- 0.1 Hz, which modulates the carrier phase +/- 0.05 radians peak, corresponding to 5% L-R modulation when no other modulation is present. The injection level shall be 5%, with a tolerance of +1, -0%.

(8) The composite signal shall be described by the following expression:

where:
A = the unmodulated carrier voltage
m = the modulation index
C_{sn} = the magnitude of the nth term of the sum signal
C_{dn} = the magnitude of the nth term of the difference signal
ω_{sn} = the nth order angular velocity of the sum signal
ω_{dn} = the nth order angular velocity of the difference signal

$$E_c = A_c\left[1 + m\sum_{n=1}^{\infty} C_{sn}\cos(\omega_{sn}t + \phi_{sn})\right]\cos\left[-\omega_c t + \tan^{-1}\frac{m\sum_{n=1}^{\infty} C_{dn}\cos(\omega_{dn}t + \phi_{dn}) + .05\sin 50\pi t}{1 + m\sum_{n=1}^{\infty} C_{sn}\cos(\omega_{sn}t + \phi_{sn})}\right]$$

ω_c = the angular velocity of the carrier

ϕ_{sn} = the angle of the nth order term = $\tan^{-1}\left[\frac{B_{sn}}{A_{sn}}\right]$

ϕ_{dn} = the angle of the nth order term = $\tan^{-1}\left[\frac{B_{dn}}{A_{dn}}\right]$

A_{sn} and B_{sn} are the n^{th} sine and cosine coefficients of C_{sn}
A_{dn} and B_{dn} are the n^{th} sine and cosine efficients of C_{dn}

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies Transmittal No. 127
Tariff F.C.C. No. 1

ORDER

Adopted: January 21, 1993; Released: January 21, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On October 22, 1992, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 127 introducing Enterprise Service,[1] proposing end-to-end DS0 service over fiber-optic transport facilities. According to NYNEX, Enterprise Service would include network management, monitoring and surveillance features, and would provide customers with a Single Point of Contact for these service management features. Transmittal 127 Description and Justification (D&J) at 4.7. To provide Enterprise Service, NYNEX contends that it must provide multiplexing equipment on the customer's premises, and asserts that the service is within the "multiplexer exception" to the Commission's prohibition against the bundling of customer premises equipment with tariffed offerings. *Id.* at 21-27.

2. On November 6, 1992, the Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed a petition to reject Transmittal 127, and Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, to suspend and investigate. NYNEX filed its reply on November 16, 1992.[2]

II. BACKGROUND

3. To provide Enterprise Service over optical fiber facilities, NYNEX argues that it is necessary to deploy multiplexing equipment at the customer premises. Optical Line Terminating Multiplexers (OLTMs) would be deployed to convert the incoming optical signal to an electrical signal, and to demultiplex the signal from DS3 (45 Mbps) to DS1 (1.544 Mbps). Newbridge Mainstreet 3600 and 3624 multiplexers then demultiplex the signal from a DS1 to a DS0 rate in order to provide the individual voice grade analog and digital data circuits. NYNEX states that the Newbridge multiplexers also make possible the performance of network functions, such as, provisioning and monitoring DS0 circuits remotely from the Single Point of Contact. D&J at 8-9.

4. NYNEX asserts that Enterprise Service meets all of the criteria of the "multiplexer exception" established by the Commission. First, NYNEX argues, the use of multiplexing equipment on the customer premises is to enable the provision of service. D&J at 21. Second, NYNEX asserts that the multiplexer is used to provide two or more tariffed DS0 channels to a single customer or to provide single tariffed DS0 channels to two or more customers. *Id.* at 22. Third, NYNEX avers that multiplexing on a regulated basis to provide Enterprise Service "permits |NYNEX| to improve the efficiency of utilization of |its| loop plan." *Id.* (citing *LADT Order*, 58 RR 2d at 379). Fourth, NYNEX argues that, although the Newbridge multiplexers are capable of providing a variety of interfaces to the customers that arguably could subsume functionalities considered to be customer premises equipment functionalities, NYNEX has no intention of doing so at this time. *Id.* Fifth, NYNEX contends that the application of the "multiplexer exception" to Enterprise Service does not adversely impact the competitive market for CPE. *Id.* at 25. Finally, NYNEX asserts that a tariffed DS0 service could not be implemented except as proposed. NYNEX states that in the specific case of a customer desiring a single DS0 circuit delivered over fiber, the CPE substitute would be to purchase DS1 service and the necessary CPE to multiplex the higher bandwidth into individual DS0 channels. In this case, NYNEX argues that it would be providing DS1, not DS0 and would be required to address service performance and provisioning at the DS1 level. *Id.* at 26-27.

III. SUMMARY OF PLEADINGS

A. Petitions

5. IDCMA asserts that the proposed multiplexing and network management functionality made available through the use of the bundled Newbridge equipment falls outside of the "multiplexer exception," and therefore Enterprise Service violates the Commission's Rules requiring the unbundling and detariffing of customer-premises equipment.[3] IDCMA Petition at 7.

6. IDCMA then discusses the multiplexer exception, stating that it would apply to a standard tariffed offering for a digital transport service at a specified speed (*e.g.*, 56 kbps), so long as: (1) the same price were charged for each like channel; (2) no minimum number of channels were required; (3) the service were sometimes delivered via multiple loops and sometimes via multiplexers deriving

[1] NYNEX initially filed its Enterprise Service tariff under Transmittal No. 91 on May 1, 1992. Transmittal 91 was subsequently withdrawn.

[2] IDCMA filed additional material, responding to the NYNEX reply, by letter dated November 25, 1992 to the G. J. Vogt, Chief, Tariff Division; and, by letter dated December 7, 1992 to J. Ross Meltzer, Associate Chief, Common Carrier Bureau. The Securities Industry Association (SIA) filed informal comments on December 9, 1992, to which IDCMA responded on December 11, 1992. On December 22, 1992, NYNEX filed a latter to G. J. Vogt, responding to allegations made by IDCMA concerning the implications of this matter on U.S. foreign trade policy. IDCMA also filed a letter, dated January 11, 1993 to C. A. Tritt, addressing issues related to waivers of Section 64.702(e), of the Commission's rules, 47 C.F.R. § 64.702(e). NYNEX filed a letter, dated January 15, 1993 to C. A. Tritt, also addressing issues related to waivers of Section 64.702(3), 47 C.F.R. § 64.702(e).

[3] Much of IDCMA's objection to Enterprise Service lies in the proposed locations of the Newbridge equipment, which include the basement, the telephone closet or room on a floor serving multiple users, or "various locations throughout the building." *Id.* at 9-10, citing D&J at 9 n.4. IDCMA suggests that if properly clarified as being available only at the first two locations, the offering could be permissible. *Id.* at 9.

multiple channels for a single, high-capacity transport medium (such as fiber); and (4) no additional functionalities were provided by way of the customer premises multiplexers. *Id.* at 17-18.

7. Thus, IDCMA contends that the two principal obstacles to NYNEX's invocation of the multiplexer exception for Enterprise Service are: (1) the service is inherently a derived channel service; and (2) customers receive not only a transport capability but also a "network management" function which is dependent upon use of the customer-premises multiplexers to perform monitoring, diagnostics, and reconfiguration functions, not just to derive individual whole-bandwidth channels. In both respects, says IDCMA, the offering violates the fundamental requirement of transparency; customers both know and care that multiplexers are being used to deliver their service. *Id.* at 18.

8. IDCMA next argues that, if NYNEX believes that the use of the Newbridge equipment on a customers' premises is necessary to bring a new service to the public and that this new service cannot be attained through the use of comparable CPE, then NYNEX should be invoking the waiver standard that the Commission has created for such circumstances, not the multiplexer exception. *Id.* at 19. *Id.* According to IDCMA, NYNEX's Enterprise Service does not meet the waiver standard anyway with respect to its description of the service -- that the CPE provides any functionality that cannot be provided by competitively-supplied equipment. *Id.* at iii.

9. IDCMA next asserts that NYNEX's Customer Specific Service Management will not work with comparable, user-provided CPE because it utilizes the proprietary network management capabilities of the Newbridge equipment, thus, violates the loopback standard for Network Channel Terminating Equipment (NCTE) as stated in the *Computer III, Phase II Order*.[4] *Id.* at 22. Finally, IDCMA discusses future capabilities of Enterprise Service which would entail greater intrusion into the realm of competitive CPE. *Id.* at 26.

10. MFS also argues that NYNEX has not met the showing required to invoke the multiplexer exception. MFS Petition at 11-12. MFS states that NYNEX's defense of Enterprise Service is inherently contradictory. On one hand, says MFS, in order to establish discriminatory rates, NYNEX argues that the Single Point of Contact and Customer Specific Service Management functions distinguish Enterprise Service from its already-tariffed services. On the other hand, according to MFS, NYNEX attempts to "shoehorn" Enterprise Service into the multiplexer exception by arguing that the multiplexers are wholly transparent to the customers, and do not add any functionality that is not otherwise provided through its basic service offerings. *Id.* at 9.

B. Reply

11. In its reply, NYNEX asserts that Enterprise Service does not provide network management functionalities to customers. NYNEX states that Customer Specific Service Management merely refers to the ability of technicians located at the Single Point of Contact to "view and manage the network facilities of each customer." NYNEX Reply at 9. While NYNEX argues that network management capabilities are not made available to customers, it states that "[t]hey make it possible for the customer to contact [a NYNEX] representative at a single location, any time of the day or night, who will be able to address all of the customer's needs regarding its NYNEX Enterprise Service." *Id.* at 9-10. Thus, NYNEX asserts that Customer Specific Service Management is "a short-hand reference to the activities of [NYNEX] technicians, not a functionality that is available for use by ... customers." *Id.* at 10. Further, NYNEX contends that its network management functionalities represent "updated" and "improved" versions of technologies that were available through multiplexing equipment in the past, including earlier versions of Subscriber Line Carriers. *Id.*

12. Concerning IDCMA's contention that the Newbridge multiplexer is incompatible with third-party network management CPE, NYNEX states that its offering does not preclude additional monitoring and/or testing by the customer. *Id.* at 10 and 11. NYNEX adds that any CPE that meets the identified tariffed service interface specifications may be connected to Enterprise Service. *Id.* at 12.

13. NYNEX next contends that its multiplexer is being used in the same manner and for the same purpose as a D-4 channel bank, which NYNEX defines as: the provision of basic tariffed service of (1) two or more channels to a single customer or (2) single channels to two or more customers. *Id.* at 13. Citing IDCMA's statement that certain configurations may be permissible (referring to the three proposed locations of the Newbridge 3624 multiplexer), NYNEX avers that the manner and purpose test does not address configurations, or distinguish among classes of customers. *Id.* NYNEX asserts that, as a practical matter, fiber-based services must be multiplexed; thus, the deployment of multiplexers associated with such fiber-based services cannot be "perfectly" transparent. *Id.* at 18. NYNEX asserts that "transparency to the customer" was intended by the Commission as a guideline and not as a central holding of the *LADT Order*. *Id.*

14. NYNEX's final response to IDCMA's petition asserts that Enterprise Service meets the criteria of the *LADT Order*, and is not a "derived channel service." NYNEX avers that, to the contrary, Enterprise Service provides whole-bandwidth subrate channels and, does not provide CPE functionalities to customers. Thus, says IDCMA, the service is distinguishable from the one at issue in the *LADT Order*. *Id.* at 15.

---

[4] Amendment to Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Report and Order, 3072 FCC Rcd 3072, 3105 (1987) (*Computer III, Phase II Order*) , stating: "[C]arriers may provide equipment on customer premises to support functions necessary to perform loopback tests from the demarcation point subject to the following two conditions: (a) the provision of such equipment must not interfere with performance of any of the functions performed by competitively-supplied NCTE, and (b) the NCTE functionality provided to supply the loopback test may be used only for that purpose."

IV. DISCUSSION

15. Section 64.702(e) of the Commission's Rules prohibits carrier provision of customer-premises equipment on a regulated basis.[5] The *Computer III, Phase II Reconsideration Order*,[6] establishes two alternative methods by which carriers may be permitted to provide multiplexing equipment at the customer's premises on a tariffed basis. First, the carrier may demonstrate that the equipment falls within the multiplexer exception. To do so, the carrier has the burden of demonstrating that: (1) multiplexing equipment was provided under the multiplexer exception at the time of the *Computer III, Phase II Reconsideration Order;* or (2) equipment in the instant case is an updated or improved version of such grandfathered equipment, and will be provided "in the same manner, and for the same purpose" as the grandfathered equipment. An alternative procedural option for carriers seeking to provide CPE under tariff is to obtain a waiver of Section 64.702(e). Under the standard of the *Computer III, Phase II Reconsideration Order*, a carrier seeking a waiver must show: (1) that a tariffed offering of equipment will increase the efficiency of a basic service offering, or will make technically possible the delivery of a basic service; and (2) that the attainment of comparable efficiencies or service offerings cannot be achieved with the use of unregulated CPE.[7] We first address whether NYNEX has met its burden of demonstrating that the multiplexers provided with its Enterprise Service falls within the multiplexer exception.

16. In our order concerning BellSouth Transmittal No. 30,[8] the Bureau stated that the "manner and purpose" showing of the *Computer III, Phase II Reconsideration Order* for upgraded or improved versions of grandfathered equipment could be made by providing evidence of the functionalities of the equipment identified in that order, and evidence of all functionalities of the equipment for which the carrier now claims the exception. NYNEX has failed to make such a showing. In fact, it is clear from the record that multiplexing equipment provided in Enterprise Service includes additional functionalities which were not provided by the D-4 channel banks or subscriber loop carriers (SLCs) at the time of the *Computer III, Phase II Reconsideration Order*. We therefore conclude that NYNEX has failed to successfully assert the multiplexer exception. Accordingly, we conclude that NYNEX's Transmittal No. 127 violates Section 64.702(e) and does not fall within the multiplexer exception to that rule.

17. NYNEX has not specifically pursued the alternative procedural option -- to request a waiver of Section 64.702(e) of the Commission's rules. However, there is sufficient information on the record to enable an analysis pursuant to the waiver standard of the *Computer III, Phase II Reconsideration Order*.

18. The first part of the waiver standard requires a showing that the equipment performs functions that increase efficiency, or makes technically possible the delivery, of a basic service. NYNEX argues that "the cards associated with the digital interfaces are remotely provisionable, within their specific class of service;" *i.e.*, "digital interface cards can be remotely provisioned to provide any of the digital subrate speeds, thereby permitting the alteration of service specifications without dispatching a technician." NYNEX Reply at 11. NYNEX states that these efficiencies accrue to NYNEX in provisioning service to Enterprise customers. NYNEX states that these functionalities are in the network, and are not accessible by Enterprise customers. Thus, it appears that Enterprise Service would enable significantly greater network efficiencies to NYNEX by placing multiplexing equipment on the customer's premises. In addition, the service enables NYNEX to deliver DS0 fiber service to customers more efficiently by enabling multiple smaller users to share the capacity of a DS1. Therefore, NYNEX has met the first prong of the waiver standard.

19. The second part of the waiver standard requires a showing that the provision of such functions through unregulated CPE will not permit attainment of comparable efficiencies or service offerings. NYNEX argues that customers providing their own CPE would be forced to purchase DS1 (or the equivalent of 24 DS0 channels) in addition to the demultiplexing equipment. Thus, NYNEX argues that the only way it can offer a DS0 interface to the customer is with the multiplexing equipment provided as part of the regulated service. NYNEX Reply at 6-7. IDCMA argues that NYNEX's argument is flawed because a DS1 capacity facility must connect to the multiplexer whether the multiplexer is provided as CPE or as proposed in Enterprise Service. IDCMA Letter of January 12 at 4. IDCMA asserts that NYNEX can provide the multiplexers on customer's premises on an unregulated basis, and can market this equipment jointly with its regulated service. *Id.* at 6. IDCMA further contends that, even service involving multiple Enterprise customers terminating their private lines on the premises of other customers can be provided on an unregulated basis.

20. We believe NYNEX has met the second prong of the waiver test for Enterprise Service provided to a customer subscribing to 22 or fewer DS0 channels at one location. Consequently, we will waive Section 64.702(e) to permit NYNEX to offer Enterprise Service at the DS0 level, as described in its Transmittal No. 127, to such customers. NYNEX has not attempted to justify a waiver for service to a single customer receiving 23 or more DS0 channels at one location, and thus, this waiver does not extend to that situation. NYNEX has demonstrated that it cannot provide DS0 service to individual customers in multitenant situations on a comparably efficient basis if it is forced to offer the Newbridge multiplexer as unregulated CPE. Provision of a deregulated multiplexer to multiple customers, each desiring fewer channels, would be more complicated, especially where the customers in the building at one end of the private line service may be different from those in the building at the other end. Such customers would have to locate, and enter into complex arrangements with, other

---

[5] Section 64.702(e) states: "Except as otherwise ordered by the Commission, after March 1, 1982, the carrier provision of customer-premises equipment used in conjunction with the interstate telecommunications network shall be separate and distinct from provision of common carrier communications services and not offered on a tariffed basis."

[6] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase II, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1150, 1167-1168(1988)(*Computer III, Phase II Reconsideration Order*).

[7] *Id.*

[8] BellSouth Telecommunications Digital Transmission Service, Order, 7 FCC Rcd 5504 (1992).

customers with whom they could share multiplexing equipment costs, including wiring costs from the customers premises to the equipment location. In addition, requiring customers to share equipment would create confusion, or at least unnecessarily complicated arrangements, with respect to customer's rights to access the equipment. Customers exercising their ownership interest in the multiplexer could also interfere with NYNEX's ability to deliver a quality network management service to others sharing the equipment. Finally, the need to enter into maintenance agreements for shared equipment could further limit the desirability of sharing. IDCMA has failed to support its arguments that competitive provision of this multiplexer will yield comparable efficiencies to Enterprise Service at the DS0 level. NYNEX has convinced us that customers who subscribe to small numbers of channels cannot receive network management services provided as part of Enterprise if the multiplexers were provided as unregulated CPE. Therefore, because Enterprise Service cannot be provided on a comparably efficient basis using unregulated CPE, NYNEX has justified a waiver as described in this Order.

21. We also seek greater assurance that customers of Enterprise Service will not have access to the Newbridge multiplexers. Therefore, we require NYNEX to amend its tariff to explicitly prohibit customer access to the Enterprise Service provided multiplexing equipment. We also require that the tariff reflect and be limited to those network management functionalities specifically described in NYNEX Transmittal 127.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that the petition to reject NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 127, filed by the Independent Data Communications Manufacturers Association, Inc. IS DENIED IN PART and GRANTED IN PART.

23. IT IS FURTHER ORDERED that NYNEX Telephone Companies IS GRANTED a waiver of Section 64.702(e) of the Commission's Rules to the extent necessary so that it might offer the premises multiplexer as part of the tariffed Enterprise Service, as described in NYNEX Transmittal No. 127.

24. IT IS FURTHER ORDERED that NYNEX Telephone Companies SHALL FILE tariff revisions reflecting the language specified in paragraph 21 *supra*.

25. IT IS FURTHER ORDERED that for the above purpose Sections 61.58 and 61.59, 47 C.F.R. §§61.58 and 61.59, ARE WAIVED and Special Permission No. 93-68 is assigned. This filing shall be made on not less than 5 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 92-234

In the Matter of

Inquiry into Encryption Technology
for Satellite Cable Programming

ORDER EXTENDING DEADLINE FOR FILING REPLY COMMENTS

Adopted: January 21, 1993; Released: January 21, 1993

Comment Date: December 24, 1992
Reply Comment Date: January 26, 1993

By the Chief, Office of Plans and Policy:

1. The Commission has received a "Motion for Extension of Time" in the above-captioned proceeding from General Instrument Corporation (GIC). GIC has requested extension of the reply comment deadline from January 22 to January 29. In support of its request, GIC notes that, because the Commission closed early on December 24, 1992, certain comments were not filed until December 28, 1992, the next business day. (Friday, December 25 was a holiday.) For this reason, some comments, including those of Titan Satellite Systems Corporation, were not available to GIC until December 29. Because of this delay, and because another holiday and the Presidential Inaugural events are also within the reply comment period, GIC believes that an extension is warranted. Good cause for an extension having been shown, IT IS ORDERED that the deadline for reply comments in PP Docket No. 92-234 is extended to Tuesday, January 26, 1993. This additional filing time will compensate for the delay imposed on participants in this proceeding by the Commission's early closing on December 24, 1992. This action is taken pursuant to Section 4(i) of the Communications Act of 1934, as amended, under authority delegated to the Chief, Office of Plans and Policy by Section 0.271 of the Commission's Rules, 47 C.F.R. §0.271.

FEDERAL COMMUNICATIONS COMMISSION

Robert Pepper, Chief
Office of Plans and Policy

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Petition for an Expedited
Declaratory Ruling
Filed by National Association
for Information Services,
Audio Communications, Inc., and
Ryder Communications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1993; Released: January 22, 1993

By the Commission:

1. In this order, we grant a petition filed by the National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc. (NAIS) requesting that the Commission preempt a decision by the South Carolina Public Service Commission (South Carolina PSC) that establishes blocking requirements for 900 "pay-per-call" telephone services available to subscribers in the state.

BACKGROUND

2. On September 26, 1991, the Commission adopted the *900 Services Order* that established rules governing interstate 900 services.[1] The *900 Services Order* requires that a local exchange carrier offer its subscribers, where technically feasible, "an option to block interstate 900 services."[2] In promulgating the 900 services blocking option, the Commission envisioned that each residential subscriber would be offered "one opportunity to block 900 services upon request and at no charge."[3] In the order, the Commission stated that most states had made some form of free blocking available, and our requirement merely made uniform state blocking practices in this area.[4] In addition, the *900 Services Order* affirmed that states have a legitimate interest in various blocking practices. The *900 Services Order* did not foreclose or preempt state blocking regulations, as opposed to state preamble requirements, because it did not appear that current state blocking practices created a conflict with the policies established in the *900 Services Order* with regard to interstate communications.

3. On February 27, 1992, the South Carolina PSC issued an *Order* that established requirements for the provision of "all" 900 and 900-type services to subscribers in the state.[5] The South Carolina PSC required local exchange carriers (LECs) to poll all existing subscribers, through billing inserts or a separate mailing, as to whether they want access to 900 services. Under the South Carolina *Order*, subscribers that want access to 900 services must return a ballot; unreturned ballots will result in the automatic blocking by the LEC of all 900 service access. The state regulation would also require LECs to offer new customers the option of blocking access to 900 services at the time service is established, and that new customers who do not indicate a choice will have access to 900 services automatically blocked.[6]

4. On April 23, 1992, the National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc. (NAIS) petitioned the Commission for expedited declaratory relief from the South Carolina *Order*.[7] NAIS requests that the Commission declare that the South Carolina regulations: (1) impermissibly apply to the provision of interstate 900 and 900-type services offered in the state; (2) conflict with the FCC's *900 Services Order* blocking requirements for interstate 900 services; and (3) will severely injure existing interstate 900 service providers offering service in South Carolina.

5. On June 18, 1992, the South Carolina PSC stayed implementation of its 900 blocking rules until September 18, 1992.[8] On September 18, 1992 the South Carolina PSC extended the stay until December 18, 1992, pending Commission review of the NAIS petition.[9]

6. On October 29, 1992, the "Telephone Disclosure and Dispute Resolution Act" ("900 Services Act") became law.[10] Congress in the *900 Services Act* found that 900 Services and pay-per-call businesses "provide valuable information, increase consumer choices, and stimulate innovative and responsive services," and additionally establisned certain regulatory requirements designed to protect consumers when they seek to use 900 services.[11] The

---

[1] *See Policies and Rules Concerning Interstate 900 Telecommunications Services, Report and Order*, CC Docket No. 91-65, 6 FCC Rcd 6166 (1991), *pets. for recon. pending.*

[2] *Id.* at 6174, para. 47. *See* 47 C.F.R. §64.713. We note that our blocking requirement applied only to 900 prefix services, not to other prefix pay-per-call services.

[3] *Id.* at 6175, para 49.

[4] *Id.*

[5] *Proceeding to Establish Rules and Regulations for Provisioning of 900 and 900 Type Services Within the State of South Carolina, Order of the Commission, (Order)* , South Carolina Docket No. 91-034-C, Order No. 92-145 (February 27, 1992).

[6] Under South Carolina law, regulations promulgated by the South Carolina Public Service Commission become effective upon approval of the state's General Assembly and the Governor, or after 120 days if the General Assembly and the Governor fail to act. The South Carolina PSC 900 blocking regulations were approved by the General Assembly in May, 1992 and signed by the Governor in June 1992.

[7] Comments and Reply Comments on the NAIS petition were filed by the parties listed in the attached Appendix.

[8] *Proceeding to Establish Rules and Regulations for Provisioning of 900 and 900 Type Services Within the State of South Carolina, Order Granting Stay*, South Carolina Docket No. 91-034-C, Order No. 92-470 (June 18, 1992).

[9] *Proceeding to Establish Rules and Regulations for Provisioning of 900 and 900 Type Services Within the State of South Carolina, Order Granting Extension of Stay*, South Carolina Docket No. 91-034-C, Order No. 92-820 (September 18, 1992).

[10] *See* Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556 (1992)(*900 Services Act*).

[11] *Id.* at §1(b). The 900 Services Act establishes FCC authority over common carriers regarding 900 services and Federal Trade Commission (FTC) authority over 900 service providers. Among the Act's requirements, the FCC shall: limit pay-per-call service offerings to certain telephone number prefixes and area codes; require common carriers to make publicly available certain

legislation establishes federal 900 service blocking requirements that are essentially identical to the blocking requirements established in the *900 Services Order*.[12] The Commission is required to adopt regulations implementing the 900 Services Act, including the blocking requirement, within 270 days.

II. PETITION AND COMMENTS

7. The NAIS petition contends that the vast majority of 900 pay-per-call information services are interstate in nature, and that local exchange carriers cannot separate 900 service calls into interstate and intrastate 900 services calls for purposes of state regulation.[13] The petition further contends that the South Carolina action conflicts with federal regulations and policy over interstate 900 services as embodied in the *900 Services Order*.[14] The petition argues that preemption of the South Carolina *Order* is warranted because the South Carolina *Order* attempts to regulate interstate communications directly, and insofar as applicable to interstate communications, it negates federalobjectives.[15] Petitioners maintain that South Carolina's default blocking rule conflicts with the Commission's public interest goal of generally providing access to interstate 900 services with an option to block.

8. 900 service providers and trade associations filing in support of the petition contend that pay-per-call services provide U.S. consumers and businesses with a vast array of valuable information services.[16] They argue that the South Carolina automatic default blocking requirement would have the effect of blocking access to all 900 services, including interstate services, for all South Carolina consumers that do not respond to balloting as to whether they want blocking. They contend that if allowed to stand, the state regulation would impose substantial and irreparable economic injury upon interstate 900 service providers by preventing consumers from placing calls to them.[17]

9. Commenters filing in support of the petition, also argue that the South Carolina regulations impermissibly apply to the provision of interstate 900 and 900-type services offered in the state, and conflict with the Commission's *900 Services Order*'s blocking requirements.[18] COAC and LO-AD assert that the South Carolina *Order* is designed to, and will result in, the virtual unavailability of 900 services in the state because many or most subscribers will not return the ballots accompanying their telephone bill.[19] COAC, IIA, and Phone Programs maintain that the South Carolina regulations, if allowed to stand, would serve as an example to other states that may similarly seek to severely restrict the provision of interstate 900 services.[20] In addition, many 900 service providers argue that the state regulations at issue will severely injure existing interstate 900 service providers offering service in South Carolina.[21]

10. AT&T, USTA, and other commenters argue that it is not technically possible for an originating local exchange carrier to block intrastate 900 calls without also blocking interstate 900 calls because the originating LEC is not able to identify the destination of 900 calls it delivers to interexchange carriers.[22] Although BellSouth does not favor preemption, it also contends that 900 services are inseverable.[23] Although USTA does not specifically urge that the NAIS petition be granted, it contends that in view of the inability of the originating LEC to jurisdictionally identify outgoing calls, there can only be one blocking scheme for 900 services.[24]

11. Parties opposing preemption advance several principal arguments in opposition to preemption. Numerous commenters assert that the Commission may not and/or should not preempt the South Carolina regulations because Congress in the Communications Act of 1934 established a dual state and federal regulatory scheme for communications.[25] Several commenters state that the South Carolina regulations are fully consistent with, and promote the express purpose of, the Commission's 900 service blocking requirements.[26] They maintain that the South Carolina regulation is consistent with federal policy in that it estab-

---

information on pay-per-call services and pay-per-call providers; and allow the subscriber to block access to 900 services. The FTC is required under the act, among other things, to: require 900 service providers to include certain specific information in a preamble; prohibit provision of pay-per-call services through 800 numbers; require advertisements for 900 services to clearly and conspicuously disclose the cost of the service.

[12] *Id.* at §228 (c)(4).

[13] NAIS Petition at 9-10.

[14] NAIS Petition at 11-16.

[15] *Id.* 9-16.

[16] *See* DMA Comments at 2; Phone Programs Comments at 1; Viking Update Comments.

[17] COAC Comments at 12; DMA Comments at 4.

[18] Commenters filing in support of the petition include: AT&T, Advanced Telecom Services, Inc., Audio Communications, Inc., COAC, DMA, Edmunds Publications Corporation, IIA, LO-AD, NexTel, Phone Programs, Inc., Sports Magazines of America, Inc., Viking Update, and the Weather Channel.

[19] COAC Comments at 12; COAC Reply Comments at 13; LO-AD Reply Comments at 5-7.

[20] COAC Comments at 2-3; IIA Comments at 4; Phone Programs Comments at 3.

[21] *See* COAC Comments at 13; COAC Reply Comments at 12-13; DMA Comments at 4; IIA Comments at 6; LO-AD Reply Comments at 2; Nextel Comments; Weather Channel Comments at 1.

[22] *See* AT&T Comments at 5-6; COAC Comments at 5-6; COAC Reply Comments at 4; *Ex parte* letter from W.W. Jordan, Director, Federal Regulatory, BellSouth Telecommunications Inc., to Donna Searcy, Secretary, FCC, September 28, 1992; IIA Comments at 5; USTA Comments at 5-7. Only two parties opposing preemption address the inseverability of 900 services. *See* California Reply Comments at 4; NARUC Comments at 7-8. NARUC asserts, without support, that interstate and intrastate 900 services are severable. California contends that the issue of whether 900 services are jurisdictionally severable is immaterial in this proceeding since the Commission has already indicated that state tariffs may allow for the blocking of access to both interstate and intrastate 900 services.

[23] BellSouth does not support the particular blocking method initiated by South Carolina, but asserts that the state regulation does not conflict with federal blocking policy. BellSouth Reply Comments at 3-4.

[24] USTA Comments at 7.

[25] *See* NARUC Comments at 8-9; NYDPS Reply Comments at 3-4; SCPSC Comments at 4-6; SCPSC Reply Comments at 4-5; SCTC Reply Comments at 8-9. These parties generally assert that Section 152 (b) of the Communications Act and the U.S. Supreme Court's decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), provide South Carolina with the authority to regulate intrastate 900 services.

[26] *See* California Reply Comments at 2-3; NARUC Comments at 5-7; NYDPS Reply Comments at 5; SCCA Reply Comments at 3; SCPSC Comments at 7-8; SCPSC Reply Comments at 3; SCTC Reply Comments at 5.

lishes a subscriber blocking option as required by FCC rules.[27] SCPSC, NARUC, and NYDPS claim that the state regulation does not conflict with the Commission's rules because the FCC in the *900 Service Order* declined to preempt state blocking requirements in recognition of state authority over intrastate communications.[28] Furthermore, SCPSC and NARUC argue that South Carolina's blocking requirements are appropriate since the Commission in the *900 Services Order* failed to specifyhow blocking was to be implemented, while expressly recognizing "legitimate" state blocking practices.[29] SCPSC also contends that its blocking scheme will not unreasonably injure customers or 900 service providers because customers can obtain access to 900 services merely by requesting it.[30] Finally, South Carolina claims that its regulations apply only to intrastate 900 service calls.

II. DISCUSSION

12. Section 2(a) of the Communications Act specifically grants the Commission jurisdiction over "all interstate and foreign communications by wire and radio."[31] At the same time, Section 2(b) of the Act retains for the states "jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications by wire..."[32] The Supreme Court, in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) articulated the test for determining when preemption is consistent with Section 2(b) of the Act. As set forth in *Louisiana* and developed in subsequent case law, the Commission may preempt state regulation when the state regulation would thwart or impede the exercise of lawful federal authority over interstate communications, such as when it is not "possible to separate the interstate and intrastate portions of the asserted FCC regulations.[33] Similarly, the 900 Services Act authorizes state authorities to enact and enforce "additional and complementary oversight and regulatory systems or procedures, or both, so long as such systems and procedures govern intrastate services and do not significantly impede the enforcement of this section or other Federal statutes."[34]

13. We address first whether our policy for interstate 900 services permits local exchange carriers voluntarily to implement automatic default blocking for interstate 900 services. We conclude that it does not. We then address whether it is possible for carriers to implement automatic default blocking for intrastate 900 calls as required by South Carolina while complying with federal policy that they may not implement that blocking for interstate 900 calls. We conclude that they cannot, and that implementation of the South Carolina blocking requirements for intrastate calls would thus also necessarily apply to interstate 900 calls. We therefore conclude that implementation of the South Carolina requirements would thwart and impede our blocking policies for interstate 900 calls. We also conclude that the South Carolina blocking requirements are not additional and complementary within the meaning of the 900 Services Act. We therefore preempt the South Carolina blocking requirements.

14. *Federal Policy for Interstate 900 Services Blocking.* It is our goal under the Communications Act to encourage the availability to U.S. consumers of a wide variety of innovative communications and information services. We have taken important regulatory steps to achieve this goal.[35] It is also our goal under the Communications Act to encourage the provision to the public of new technologies and services, including interstate 900 services.[36]

15. In the *900 Services Proceeding*, we recognized that 900 services bring valuable services and information sources to U.S. consumers.[37] Congress similarly found in the 900 Services Act that pay-per-call services "provide valuable information, increase consumer choices, and stimulate innovative and responsive services that benefit the public."[38] Comments in this proceeding also reveal that there are many interstate 900 services that can, and do, offer consumers a wide variety of innovative communica-

---

[27] *See* California Reply Comments at 3; SCPSC Reply Comments at 4.

[28] NARUC Comments at 6-7; NYDPS Reply Comments at 2; SCPSC Comments at 6-7.

[29] *Id.* NARUC and SCPSC cite to language in the *900 Services Order* that states that: "[t]here are blocking and disconnection practices in which the states have a legitimate interest, and which now appear not to impinge upon our jurisdiction to regulation interstate communications. We do not foreclose such regulation, and do not preempt any such requirement at this time, because it appears that the state activity does not create a conflict with the policies we establish herein." 6 FCC Rcd at 6181, para. 87.

[30] SCPSC Reply Comments at 7-8.

[31] 47 U.S.C. Section 152(a).

[32] 47 U.S.C. Section 152(b).

[33] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). *See also Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1217); *Texas Public Utility Comm'n v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *National Association of Regulatory Commissioners v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104, 116 (D.C. Cir. 1989); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[34] 900 Services Act at Sec. 228(g)(4).

[35] *See e.g.*, Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, Report and Order 104 FCC 2d 958 (1986) (*Computer III* or *Phase I Order*) , *recon.* 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.* , 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*); *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987), (*Phase II Order*) , *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*); *further recon.*, 4 FCC Rcd 5927 (1988) (*Phase II Further Reconsideration Order*); *Phase II Order vacated* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, Report and Order, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC (9th Cir. Feb. 14, 1992) (No. 92-70083, consolidated on June 2, 1992 with MCI v. FCC, No. 92-70186, NY v. FCC, No. 92-70217, ANPA v. FCC, No. 92-70261); California v. FCC (9th Cir. Feb. 21, 1992) (No. 92-70105, consolidated on June 2, 1992 with NYPSC v. FCC, No. 92-70281).

[36] 47 U.S.C. Section 157.

[37] *See Policies and Rules Concerning Interstate 900 Telecommunications Services, Notice of Proposed Rulemaking*, CC Docket No. 91-65, 6 FCC Rcd 1857, para. 4 (1991).

[38] 900 Services Act at §1(b).

tions and information services.[39] These services include: weather, sports, and business information; charitable and public-interest fund-raising services; classified advertisement services; services used by educational broadcast stations; winning lottery number updates; daily horoscope forecasts; trivia games; and sweepstakes.[40] Accordingly, we affirm that it is our goal to encourage the availability of 900 services because such services serve the public interest.

16. We have also recognized the need for regulatory requirements applicable to interstate 900 services to protect consumers. As indicated, in the *900 Services Order* we adopted various requirements, including the requirements that LECs offer consumers the opportunity to block access to interstate 900 services. These blocking requirements preserve the general availability of 900 services, with their attendant benefits, while still ensuring that consumers can control their exposure to pay-per-call services. We sought to enable consumers to make informed decisions to protect themselves against unreasonable rates and practices associated with certain 900 services.

17. The regulatory framework adopted in the *900 Services Order*, contemplated the continued general availability of interstate 900 services unless consumers specifically request blocking. At the time we examined the need for 900 services regulatory requirements, these services were generally available: LECs in 38 states offered subscribers blocking that generally permitted customers to access 900 services unless blocking was specifically requested.[41] Indeed, the need for various regulatory requirements, such as a preamble requirement, was occasioned by the growing availability of, and access to, 900 services. The language used to establish our blocking requirements shows that our focus was to give consumers a measure of control over access to 900 services in light of the general availability of 900 services. We required local exchange carriers to provide subscribers "with the *option to request* blocking of 900 service."[42] Thus, we required "that each subscriber be offered one free opportunity to block 900 services upon request and at no charge."[43] We determined that the LEC should be permitted to charge residential subscribers a reasonable one-time fee for each subsequent request to "unblock or reblock after he or she has been given one free block."[44] Thus, through our blocking standard, we expressed federal policy on where the balance should be struck between maintaining the general availability of, and easy access to, 900 services, and empowering the consumer with control over his or her exposure to those services.

18. By contrast, automatic default blocking would strike a very different balance between the goals of encouraging interstate 900 services and facilitating consumer control over their family's exposure to 900 services. It promotes the latter goal by establishing that, absent a specific election by the consumer, there will be *no* access to interstate 900 services. As such it gives no weight to the goal of making interstate communications services generally available. As explained by some commenters, automatic default blocking for those consumers that have not made an election prevents them from making an "on the spot" decision to call a 900 service, some of which can provide emergency assistance and information.[45] In contrast, implementation of our 900 service requirements through optional blocking appears to have been very effective in addressing our consumer control concerns without denying access to those consumers choosing to use 900 services.[46] In sum, automatic default blocking would not be consistent with the balance struck in the *900 Services Order*, and therefore its implementation by a LEC would thwart and impede federal policy for access to interstate 900 services.[47]

19. In the *900 Services Order* we stated that state blocking practices did not conflict with our federal blocking requirements.[48] That determination, however, was based upon the record in that proceeding. And, as already indicated, the state practices to which we referred did not involve automatic default blocking. Thus, contrary to the assertions of some commenters, we did not authorize implementation by states of any blocking requirements regardless of their impact on our goals for interstate 900 services and interstate communications generally.

---

[39] *See* DMA Comments at 2; Phone Programs Comments at 1; Viking Update.

[40] *Id.*

[41] *See* National Association of Regulatory Utility Commissioners Compilation of Utility Regulatory Policy 1991-1992 at 294, Table 128. At least 26 states had adopted blocking requirements at the time of the *900 Services Order*. *Id.* There is no indication in the record that any of these state blocking requirements were similar to South Carolina's. We note that the Commission has not received any petitions from 900 services providers concerning blocking practices of other states.

[42] *900 Services Order*, 6 FCC Rcd at 6174, Para. 46 (emphasis added).

[43] 6 FCC Rcd at 6175.

[44] *Id.*

[45] *See* Weather Channel Comments at 1-3.

[46] Consumer complaints on interstate pay-per-call services received by the Commission, since the *900 Service Order's* release, have dropped dramatically. *See Consumer Complaints and Inquiries about Common Carrier Issues Received During the Months of August 1991 and August 1992*, FCC, Common Carrier Bureau, Enforcement Division (1992). For the four month period before the Commission's *900 Services Order* went into effect, the Commission received on average, approximately 215 pay-per-call services complaints per month. In a recent four month period (May-August 1992) after the *900 Services* rules went into effect, these complaints dropped to an average of 84 per month. In addition, we note that the record reveals that there has also been a precipitous drop in the number of complaints about 900 services in South Carolina. *See* COAC Reply Comments at 19-20. According to COAC, South Carolina received a total of only 6 pay-per-call service complaints in the first half of 1992, compared to 84 such complaints received in the first half of 1991. *Id.*

[47] This is in contrast also with our blocking requirements for indecent communications. There, we established a "reverse blocking" regime under which telephone companies block access to specified exchanges or numbers *unless* the customer has specifically requested access. In that area, however, there exists a compelling government purpose of restricting access by minors to indecent messages. Thus, we have established blocking requirements that are more restrictive than those applicable to interstate 900 services. *Regulations Concerning Indecent Communications by Telephone, Report and Order*, Docket No. 90-64, 5 FCC Rcd 4926 (1990). See also Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (1989).

[48] The provisions of the 900 Services Act establishing blocking requirements for those services are essentially identical to the blocking provisions adopted by the Commission in the *900 Services Order*. Neither the statute nor the legislative history reveal any intent to alter the Commission's blocking requirements or policy established in the *900 Services Order*. Thus, we conclude that the 900 Services Act does not disturb our policy concerning blocking of interstate 900 services.

20. *Practical Inseverability of the Blocking of Access to Interstate and Intrastate 900 Services.* Our regulatory scheme envisions carriers providing access to 900 services to customers unless they have made an affirmative election to block. The South Carolina scheme, by contrast, would require the carrier to block customers' access to 900 services unless they have made an election to be unblocked. Carriers in South Carolina could successfully implement the federal and South Carolina blocking schemes for such customers if they can identify a particular 900 call as interstate or intrastate and then block the call or not depending on whether the federal or state scheme applies.

21. As we found in the *900 Services Order* and as the record here demonstrates, however, interstate and intrastate 900 service calls are inseverable. Local exchange carriers cannot determine whether a particular 900 services call is interstate or intrastate.[49] The NXX digits in a 900 services call indicate to the local exchange carrier to which interexchange carrier it should hand off the call.[50] The local exchange carrier does not know the location of the 900 service message sponsor that subscribes to the IXC's 900 service and, thus, is not able to identify the jurisdictional nature of a particular 900 services call.[51] Accordingly, it is not possible for carriers to implement both the federal and South Carolina blocking schemes. In order to comply with the South Carolina automatic default blocking requirements, LECs would need to apply that regime for all 900 services calls, including interstate 900 calls, an outcome inconsistent with our federal policy for interstate 900 services blocking.[52] Thus, the South Carolina requirements would thwart and impede federal policy and objectives for interstate communications under federal preemption standards.[53]

22. *900 Services Act.* We additionally conclude that the South Carolina requirements are not "additional and complementary" to federal requirements within the meaning of the 900 Services Act and, therefore, are beyond state authority established by Congress in the 900 Services Act. Moreover, these requirements "significantly impede" enforcement of FCC policies under the Communications Act and are thus not permissible under the 900 Services Act.[54] Accordingly, that statutory provision supports preemption of the South Carolina blocking requirements, an action we now take.

23. Accordingly, IT IS ORDERED, that the "Petition for an Expedited Declaratory Ruling" filed by the National Association for Information Services, Audio Communications, Inc. and Ryder Communications, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PARTIES FILING COMMENTS IN THIS PROCEEDING

Advanced Telecom Services Inc.
AT&T*
BellSouth Telecommunications Inc.(BellSouth)**
California Public Service Commission (CPSC)**
Council on Audio Communications (COAC)*
Direct Marketing Association (DMA)*
Edmunds Publications Corporation
Information Industry Association (IIA)
LO-AD Communications of Nevada, Inc. (LO-AD)**
National Association for Information Services (NAIS)***
National Association of Regulatory Utility Commissioners
(NARUC)
New York Public Service Commission (NYPSC)**
NexTel
Phone Programs, Inc. (Phone Programs)
South Carolina Consumer Advocate (SCCA)**
South Carolina Public Service Commission (SCPSC)*
South Carolina Telephone Coalition (SCTC)**
Sports Magazines of America Inc.

---

[49] *See e.g., 900 Services Order* at 6180, para. 85; *Ex parte* letter from W.W. Jordan, Director, Federal Regulatory, BellSouth Telecommunications Inc., to Donna Searcy, Secretary, FCC, September 28, 1992. BellSouth, South Carolina's largest local exchange carrier, contends that its "central office switches cannot distinguish between 900 interstate and 900 intrastate calls," and therefore, it has "no knowledge of the jurisdictional nature of individual 900 service calls.

[50] "NXX" digits are the three digits immediately following the 900 prefix of the called number.

[51] AT&T has recently filed 900 service tariff revisions that offer 900 service message sponsors the capability to sort incoming 900 calls by area code of the incoming call. *See* AT&T Transmittal No. 3868, filed February 14, 1992. This new offering may permit message sponsors to jurisdictionally identify incoming 900 calls. It does not, however, provide local exchange carriers with the technical capability to identify the location of the message sponsor and, thereby, jurisdictionally identify 900 services calls originating in their service areas.

[52] We note that there are only three 900 service providers in South Carolina, whereas 1,000 interstate pay-per-call service offerings are currently accessible in South Carolina. Thus, effectuation of the South Carolina requirements would apply primarily to interstate 900 services. South Carolina PSC Comments at 7; LO-AD Reply Comments at 3.

[53] *See* cases cited at note 33, *supra*.

[54] *See also* Telephone Disclosure and Dispute Resolution Act, 138 Cong. Rec. S17120 (daily ed. Oct. 7, 1992) ("However, such regulatory procedures as the States may devise cannot thwart or impede other Federal policy objectives of the FCC, the enforcement of this section, or any other Federal statutes. Statement of Senator Inouye).

The Weather Channel (TWC)
United States Telephone Association (USTA)
Viking Update

* Filed both Initial and Reply Comments
** Filed Reply Comments only
*** Filed Petition and Reply Comments

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-223

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency in
18 U.S.C. § 1464

REPORT AND ORDER

Adopted: January 19, 1993; Released: January 22, 1993

By the Commission:

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. BACKGROUND	4
III. DISCUSSION	
A. Regulation of Broadcast Indecency	9
1. Scope of the Interest	10
2. Definition of "Children"	15
3. Harm to Children	17
B. The Channeling Approach	19
1. Children in the Broadcast Audience	20
a. Television	21
b. Radio	24
2. Accommodating Other Interests	28
a. Broadcasters	29
b. Adult Listeners and Viewers	34
c. Parents	35
3. Defense to Commission Action	37
IV. Procedural Matters and Conclusion	
A. Request for Stay	39
B. Final Regulatory Flexibility Analysis	41
C. Ordering Clauses	44

APPENDIX A -- AMENDATORY TEXT
APPENDIX B -- Commenters
APPENDIX C -- Radio Ratings Data in
MM Docket No. 89-494

I. INTRODUCTION

1. In this *Report and Order* we adopt regulations to establish the times of day during which indecent programming may not be broadcast on radio and television stations. We take this action pursuant to Section 16(a) of the Public Telecommunications Act of 1992, which states:

> The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming--
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcast station not described in paragraph (1).[1]

The regulations required under this provision "shall become final not later than 180 days after the date of enactment of this Act," *i.e.*, by February 22, 1993.[2]

2. On October 5, 1992, we released a *Notice of Proposed Rule Making*,[3] which invited interested parties to comment on proposed rules drafted in accordance with Section 16(a) and 18 U.S.C. § 1464, the principal statute governing obscene and indecent broadcasts. We also asked commenters to update the record in connection with the presence of children in the viewing and listening audience as it relates to the government's interest in restricting the broadcasting of indecent material.

3. By this *Report and Order*, Section 73.3999 of the Commission's Rules is amended[4] to: (a) prohibit obscene broadcasts at all times; (b) prohibit the broadcast of indecent material between the hours of 6 a.m. and 10 p.m. on public broadcast stations[5] that go off the air at or before 12 midnight; and (c) prohibit the broadcast of indecent programming on all other broadcast stations between 6 a.m. and 12 midnight.

II. BACKGROUND

4. The history of regulation of broadcast indecency has been set forth many times in recent years and need not be detailed here.[6] For present purposes, it is sufficient to note that, although the Supreme Court has upheld the Commis-

[1] Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992) ("Section 16(a)"), enacted August 26, 1992.
[2] *Id.*
[3] 7 FCC Rcd 6464 (1992) ("*Notice* ").
[4] *See* Appendix A.
[5] For purposes of implementing Section 16(a), we define "public broadcast station" as it is defined in Section 397(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 397(6).
[6] *See, e.g., Action for Children's Television v. FCC*, 932 F.2d 1504, 1506-07 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct 1282 (1992) ("*ACT II* ").

sion's authority to regulate broadcast indecency,[7] some aspects of our enforcement program have been under challenge since 1987 when we broadened our enforcement policies.[8] On review of that action, the D.C. Circuit in *Action for Children's Television v. FCC* ("*ACT I* "),[9] upheld our use of a generic definition of indecency[10] and affirmed our warning in one case that involved the daytime broadcast of indecent material. However, the court remanded the case insofar as we had taken action against evening broadcasts aired after 10 p.m. The court directed us to conduct a "full and fair hearing" to determine the times of day when indecent material may be broadcast.[11]

5. Before we could act on the *ACT I* remand, Congress directed us to enforce the statutory restriction on broadcast indecency on a 24-hour per day basis. Shortly thereafter, we adopted a new rule establishing a 24-hour enforcement program.[12] That enforcement program never went into effect, however, because the court stayed and later vacated it in *ACT II.* "[13]

6. While the *ACT II* case was pending before the court, and in light of a Supreme Court decision regarding "dial-a-porn" services,[14] we asked to have the case remanded to conduct further proceedings on the constitutionality of 24-hour broadcast indecency enforcement. Upon remand, we commenced a comprehensive proceeding seeking comment on many of the issues raised earlier by the court in *ACT I*, such as: (a) the definition of "children" for determining what age group is relevant in regulating broadcast indecency; (b) children's access to broadcast media and their actual listening and viewing habits to assess the risk of exposure to indecent material; (c) alternatives to 24-hour enforcement, such as channeling, program ratings, warnings, and broadcast technologies that could restrict children's access; and (d) the availability of non-broadcast alternatives for indecent materials.[15]

7. After receiving over 92,500 formal and informal submissions, we issued a report concluding that a 24-hour enforcement program appeared to be the most narrowly tailored means of effectively promoting the government's compelling interest in protecting children from broadcast indecency because, *inter alia*, there is a reasonable risk that a significant number of children are in the broadcast audience at all times of the day and night.[16]

8. In May 1991, without directly addressing our findings in the *1990 Report*, the D.C. Circuit in *ACT II* invalidated the 24-hour enforcement program as inconsistent with the holding in *ACT I*.[17] The court directed the Commission to "redetermin[e], after a full and fair hearing, . . . the times at which indecent material may be broadcast," and to "carefully review and address the concerns . . . raised in *ACT I:* among them, the appropriate definitions of 'children' and 'reasonable risk' for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts."[18] In response to the court's action striking down the 24-hour statute, Congress enacted the legislation we implement today.[19] In the discussion that follows, we respond to the issues which have been identified by the commenters and the courts that are relevant to this proceeding.[20]

III. DISCUSSION

A. Regulation of Broadcast Indecency

9. Several parties in this proceeding have argued that the scope of the government's interest in regulating broadcast indecency is very narrow, that we have yet to justify our classification of "children" as those age 17 years and under, and that there is no evidence demonstrating that indecent broadcasts harm children. We will address each of these related issues in turn.

1. Scope of the Interest

10. The overriding interest underlying Section 16(a) is the government's compelling interest in protecting children (defined as minors, ages 17 and under) from the harm of exposure to indecent broadcast materials. This interest is not, as some parties have suggested, restricted to ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts, regardless of whether parents choose to exercise that supervision.[21] Rather, it encompasses the government's independent interest in ensuring the well being of minors. This view finds support in both the legislation and the case law pertaining to broadcast indecency.

11. First, there is no suggestion in the language of Section 16(a) that Congress intended merely to foster parents' ability to supervise their children in enacting the new safe

---

[7] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica* ").

[8] *See Infinity Broadcasting Corp. of Pa. (WYSP(FM))*, 2 FCC Rcd 2705 (1987); *Pacifica Radio (KPFK-FM)*, 2 FCC Rcd 2698 (1987); and *The Regents of the University of California (KCSB-FM)*, 2 FCC Rcd 2703 (1987), *on recon. sub nom. Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd 930 (1987) ("*Infinity Reconsideration*").

[9] 852 F.2d 1332 (D.C. Cir. 1988).

[10] The Commission defines broadcast indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

[11] *Id.* at 1344.

[12] *See Order*, 4 FCC Rcd 457 (1988).

[13] 932 F.2d 1504."

[14] In *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), the Court upheld a complete ban on obscene telephone messages, but invalidated a statutory prohibition on indecent messages.

[15] *Notice of Inquiry* in MM Docket No. 89-494, 4 FCC Rcd 8358 (1989) ("*1989 NOI* ").

[16] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd 5297 (1990) ("*1990 Report* ").

[17] *ACT II*, 932 F.2d at 1508-09.

[18] *Id.* at 1510 (citing *ACT I*, 852 F.2d at 1341-44).

[19] *See* 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd).

[20] Parties filing comments in this proceeding (and the references to them used herein) are listed in Appendix B. Morality in Media filed comments after the deadlines established in the *Notice*. We will treat its comments as a permissible *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

[21] *See* Broadcasters Comments at 11; Infinity Comments at 2 (citing *ACT I*, 852 F.2d at 1343); *see also 1990 Report*, 5 FCC Rcd at 5299, 5310 n.16, and comments cited therein.

harbor.[22] Indeed, the legislative history of Section 16(a) identifies a broader objective. For example, the provision's sponsor, with no mention of parents' ability or opportunity to supervise their children, expressed concern about the powerful influence of broadcasting on the public "particularly on our children" and that "the behavior of these children in the years ahead will reflect the behavior and standards to which television has exposed them in their most vulnerable and malleable years."[23] Another proponent of the measure stated even more directly that "parental supervision is not a cure-all" and that "[p]arents deserve and need the added protection for children which this amendment offers."[24]

12. Second, the government's independent interest in protecting children from indecent material has been specifically recognized by the Supreme Court. In *Pacifica*, the Court reaffirmed its holding in *Ginsberg v. New York* that the government's two-fold interest "in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified regulation of otherwise protected expression."[25] More recently, in *Sable*, the Court reiterated that "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."[26]

13. In addition, as noted in our *1990 Report*, we have focused not only on the government's interest in helping parents supervise their children's use of the broadcast media but also on the government's independent interest in protecting children as a basis for regulating broadcast indecency.[27] We cited specific data in the *1990 Report* that showed that the "opportunity for supervision" is not sufficient. We concluded that the pervasiveness and accessibility of the broadcast media, coupled with the lack of effective control mechanisms, make effective parental supervision nearly impossible.[28]

14. Finally, we note that the government's interest is even broader than protecting children. In *Pacifica*, the Supreme Court's first stated rationale for upholding the Commission's indecency action was the right of all members of the public to be free of indecent material in the privacy of their homes. The Court found that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[29] In *Sable*, the Supreme Court again referred to this residential privacy interest, noting the "unique" attributes of broadcasting, *i.e.*, that it "can intrude on the privacy of the home without prior warning as to program content."[30]

2. Definition of "Children"

15. Closely related to the scope of the compelling interest in protecting children is the definition of the age group of children broadcast indecency regulation serves to protect. Although we addressed this issue in the *1990 Report*, some of the commenters in this proceeding continue to challenge our conclusion that children 17 and under are properly within the ambit of the government's interest in restricting access to indecent material.[31] As we explained in the *1990 Report*, based on other federal and state statutes dealing with indecent materials, as well as several Supreme Court decisions recognizing the compelling government interest in controlling the availability of indecent material to minors, Congress and the Commission have appropriately sought to protect children age 17 and under.[32]

16. None of the parties in this proceeding has refuted this justification and they present no evidence to counter the findings made in the *1990 Report* that 17 and under is the relevant age group for channeling purposes. Moreover, the sponsor of Section 16(a) on the Senate floor cited approvingly the 17 and under age group along with findings in the *1990 Report*.[33] Accordingly, we understand Congress to have relied on this definition of children in establishing the current channeling regulation. We see no reason to alter our position at this time.

3. Harm to Children

17. Commenters in this proceeding have again attacked the underlying rationale for restricting broadcast indecency on the ground that no evidence exists that such programming is harmful to children.[34] However, as we noted in our *1990 Report*, it is well established that harm to children from exposure to such material may be presumed as a matter of law.[35]

---

[22] The commenters opposed to the new broadcasting channeling program also focus on the different statutes through which Congress has regulated access to cable indecency and "dial-a-porn" telephone messages to argue that Congress is only concerned about affording parents an opportunity to supervise children's access to indecent material. To the extent that other statutes are relevant, they do not support this narrower interpretation. While facilitating parental supervision may have been chosen by Congress as one *means* of regulating indecency for those other media, this surely does not indicate that the overall governmental interest in protecting children has been reduced.

[23] 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd).

[24] *Id.* at S7309 (statement of Sen. Helms) (supporting amendment "to protect our children from indecent programs on radio and television . . . .").

[25] *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. 629 (1968)).

[26] *Sable Communications v. FCC*, 492 U.S. at 126 (citing *Ginsberg v. New York* and *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)). *See also ACT I*, 853 F.2d at 1343 n.18 (quoting *New York v. Ferber* and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

[27] *1990 Report*, 5 FCC Rcd at 5300.

[28] *Id.* at 5305.

[29] 438 U.S. 726, 748 (citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)); *id.* at 759-60 (Powell, J., concurring).

[30] 492 U.S. at 127. *See also 1990 Report*, 5 FCC Rcd at 5300, where we concluded that preserving the privacy of the home provides an alternative basis for upholding the constitutionality of restrictions on indecent broadcasting.

[31] *See* Broadcasters Comments at 17; Pacifica Comments at 5.

[32] *1990 Report*, 5 FCC Rcd at 5301.

[33] 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd).

[34] Broadcasters Comments at 14-15.

[35] 5 FCC Rcd at 5300 (citing *Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring) and *Ginsberg v. New York*, 390 U.S. at 641-43); *accord Sable*, 492 U.S. at 126-27.

18. Moreover, in connection with Section 16(a), one of the amendment's sponsors included in the record several excerpts from studies on the negative effects of television on young viewers' sexual development and behavior.[36] In proscribing the dissemination of indecent material to minors, Congress has considered testimony that cites its harmful effects[37] and has responded not only with statutes restricting indecent broadcasting, but with the passage of other statutes that limit the availability of indecent material to minors through cable television and telephones.[38] Under these circumstances, we find no merit in the challengers' arguments regarding harm.

B. The Channeling Approach

19. We analyze below the channeling enforcement program required by Section 16(a) in light of the concerns raised by the D.C. Circuit in *ACT I* and *ACT II*. We conclude that the channeling program we implement by this *Report and Order* properly accommodates the various interests of broadcasters, adults and parents. It is a narrowly tailored means of achieving the government's compelling objective of protecting children from exposure to indecent broadcast programming, and thus, in our view, comports with the First Amendment.

1. Children in the Broadcast Audience

20. In the *ACT I* and *ACT II* decisions, the D.C. Circuit indicated its concern that any channeling program regarding broadcast indecency be guided by an assessment of when there is a reasonable risk that children are in the audience. In our *1990 Report* on broadcast indecency, we examined data that showed that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day and night.[39] In enacting Section 16(a), Congress relied on the findings of the *1990 Report*.[40] We now have reexamined the data gathered in MM Docket No. 89-494, as well as additional data supplied by commenters in this rulemaking proceeding, on the presence of children in the viewing and listening audience. We find that our earlier conclusion remains true. And certainly, there is thus a reasonable risk that significant numbers of children ages 17 and under listen to the radio and view television during the enforcement period between the hours of 6 a.m. and 12 midnight.

a. Television

21. The record gathered in MM Docket No. 89-494 confirmed that broadcast television is very accessible to children. We found in MM Docket No. 89-494 that children have access to broadcast television in virtually every household, over 63% of homes have more than one television set, and between 25% and 50% of children have a set for their personal use.[41] As would be expected, most of children's television viewing occurs during the prime time hours of 8 p.m. to 11 p.m. (7 to 11 p.m. on Sundays) -- between 21% and 28% of children's weekly viewing occurs during these hours.[42] Also, a considerable amount of children's total television viewing time takes place after prime time -- between 3% (for ages 2 to 5) and 8% (for ages 12 to 17) of children's weekly viewing occurs between 11 p.m. and 1 a.m.[43]

22. In addition, the record revealed that there is a reasonable risk that a substantial number of children are in the television audience during the enforcement period specified in Section 16(a), and beyond. Several commenters in MM Docket No. 89-494 submitted data which showed that, in five metropolitan areas, the number of children in the viewing audience in the late evening was substantial. For example, in New York City, over 360,000 teens (ages 12 through 17) (24% of all teens) and almost 145,000 younger children (ages 2 through 11) (6% of the total population of younger children) watched television from 11 p.m. to 11:30 p.m., Monday through Friday.,[44] On Friday and Saturday nights in New York, over 345,000 teens (23%) and over 95,000 younger children (4%) were watching from 11 p.m. to 11:30 p.m.[45] Salem also provided late-night viewing data for the Washington, D.C., Chicago, Des Moines, and Los Angeles markets, for different months in 1989 and averaged the data for the five markets and projected the national television audience for various post-11 p.m. time frames.[46] For the 11 to 11:30 time period, Salem projected that nationally 21.2% of children ages 12 to 17 (a total of 4,293,848 teens) were watching television. From 11:30 p.m. to 1 a.m. Salem projected that the national average was 3,078,608 teens (15.2%). Salem's data were cited in support of Section 16(a) and included as part of the legislative record.[47]

23. In this rulemaking proceeding, Bonneville International Corporation submitted updated television ratings data in the two markets in which it operates television

---

[36] *See* 138 Cong. Rec. at S7309-10 (June 2, 1992) (statement of Sen. Helms), and studies cited therein.

[37] *See* Telephone Decency Act of 1987, Hearing Before the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives Committee on Energy and Commerce, 100th Cong., 1st Sess. (Serial No. 100-99, Sept. 30, 1987) at pp. 22-26, 27, 63-64, 96-97; Cable-Porn and Dial-A-Porn Control Act, Hearing Before the Subcommittee on Criminal Law of the United States Senate Committee on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985, Serial No. J-99-46) at pp. 103, 135-138.

[38] *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1486 (1992), 47 U.S.C. § 532(j) (directing the Commission "to promulgate regulations designed to limit the access of children to indecent programming" on cable television leased access channels); Pub. L. No. 101-166, title V, § 521, 103 Stat. 1192-1193, (1989) 47 U.S.C. § 223(b)(2) (prohibiting providers of indecent telephone communications for commercial purposes from making their services available to persons under age 18).

[39] 5 FCC Rcd at 5301-06.

[40] *See* 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd) (quoting findings in *1990 Report*); *id.* at S7309-7322 (statement of Sen. Helms) (quoting findings of *1990 Report* and placing *1990 Report* into legislative record).

[41] *1990 Report*, 5 FCC Rcd at 5302; *1989 NOI*, 4 FCC Rcd at 8361. *See also* 38 Cong. Rec. at S7309 (statement of Sen. Helms) (citing *1989 NOI*) .

[42] *1989 NOI*, 4 FCC Rcd at 8373, Appendix B.

[43] *1990 Report*, 5 FCC Rcd at 5303; *1989 NOI*, 4 FCC Rcd at 8373, Appendix B.

[44] Salem Communications Corp. Reply Comments in MM Docket No. 89-494 at 64 (April 19, 1990) ("Salem Reply"), *reprinted in* 138 Cong. Rec. S7320-22 (June 2, 1992).

[45] Salem Reply at 64.

[46] *Id.* at 62-65 (citing Arbitron Television Market Reports for the five markets).

[47] *See* 138 Cong. Rec. at S7320-22.

stations (Salt Lake City and Seattle).[48] According to Bonneville's data for Salt Lake City, an average of almost 28,000 children ages 2 through 17 are watching network-affiliated television stations from 6 a.m. to 10 a.m., Monday through Friday;[49] from 10 p.m. to 1 a.m. an average of 16,800 children are watching; from 10 p.m. to 12 midnight, the audience contains approximately 24,000 children; and from 11 p.m. to 12 midnight there still are at least 10,000 children viewing broadcast television on week nights and 14,000 on Saturday nights.[50] In the Seattle market, an average of 102,200 children are watching broadcast television from 6 a.m. to 8 a.m., Monday through Friday;[51] from 10 p.m. to 12 midnight, an average of 33,000 children are in the television audience; approximately 69,000 are watching at 10:30 p.m.; and Monday through Friday, at least 10,000 children are in the audience at 11:30 p.m., but on Saturdays, 70,000 children are watching broadcast television at 11:30 p.m.[52] These data show a significant child presence in the television audience during the late evening and early morning hours for these particular markets. This showing, as a sample of children's television viewing patterns in all U.S. markets, supports our conclusion in the *1990 Report* that significant numbers of children are likely to be watching television at all hours, especially from 6 a.m. to 12 midnight. No parties have attempted to directly refute these data or our conclusion.

b. Radio

24. As we determined in the *1990 Report*, radio is even more accessible to children than television with each household having an average of over five radios.[53] Studies cited in MM Docket No. 89-494 also revealed that 65% of children ages 6 to 12 have their own radio and 35% have their own headphone radio.[54] A child's opportunity for unsupervised access to radio was further demonstrated by a study which showed that 80% of the children sampled had a radio in their own bedroom (74% of children in kindergarten through 6th grades, and 88% in 7th through 12th grades).[55] The record in MM Docket No. 89-494 also showed that almost 78% of persons age 12 and over listen to radio for a minimum of five minutes daily, and 96% listen for at least five minutes weekly. Over 83% of all teenagers listen to radio at least once a day and over 99% at least once a week.[56]

25. The record in MM Docket No. 89-494 indicated that a significant number of children were in the radio listening audience at all times of the day and night, with a national average quarter-hour audience of 2,437,000 children ages 12 through 17 listening to the radio between 6 a.m. and 12 midnight (representing 12.0% of the total estimated teen population of 20,254,000) and 716,000 teens (3.5%) listening after midnight.[57] From 7 p.m. to 12 midnight, there was an average quarter-hour audience of 2,677,000 children (13.2%). The average one day "cume" (the estimated number of different persons who listen to radio for a minimum of five minutes within the specified time frame) from 7 p.m. to 12 midnight was 9,244,000 (45.6%). That is, during the 7 p.m. to 12 midnight time-frame on any given day, over 9.2 million different children ages 12 to 17 in the United States listened to the radio for at least five minutes. Even after midnight, the average one day cume showed that 3,533,000 teens (17%) were in the audience.[58] In the morning hours, from 6 a.m. to 10 a.m., 2,442,000 children (12.1%) were listening to radio during the average quarter-hour, and over 10 million children (50.3%) were in the audience for at least five minutes.[59]

26. Commenters in MM Docket No. 89-494 confirmed that a substantial portion of children ages 12 through 17 are in the radio audience.[60] For example, Salem submitted a radio study for Bakersfield, California which showed that 28% of children ages 12 to 17 in that market listen to radio between midnight and 6 a.m.[61] Other commenters provided radio ratings data in various markets confirming that large numbers of 12 to 17 year olds listen to radio at all times of the day and night.[62]

27. In this rulemaking proceeding, no parties have attempted to contradict these data or findings with regard to the presence of children in the nation's radio markets.[63] Bonneville has submitted updated radio audience data for the eight markets in which it operates radio stations showing that significant numbers of children (ages 12 through 17) are present in the radio audience late at night and early in the morning for all markets.[64] For example, in New York, 667,100 teenage children are listening from 10 p.m. to 1 a.m. and 530,400 are listening from 5 a.m. to 8 a.m.[65] At the low end of the scale, in Salt Lake City, 107,600 teenage children are in the radio audience from 10 p.m. to 1 a.m. and there are 98,900 teens listening from 5 a.m. to 8 a.m.[66] This new data confirm our previous findings that,

---

[48] Bonneville Comments at 6-7 and Exhibits 9-10 (citing Nielson data).
[49] *Id.* at Exhibit 9, p. 1.
[50] *Id.* at Exhibit 9, p. 2.
[51] *Id.* at Exhibit 10, p. 1.
[52] *Id.* at Exhibit 10, p. 2.
[53] *1990 Report*, 5 FCC Rcd at 5302. *See 1989 NOI*, 4 FCC Rcd at 8361, *cited in* 138 Cong. Rec. at S7309.
[54] *1989 NOI*, 4 FCC Rcd at 8361.
[55] *Id.*
[56] *Id.*; *see* 138 Cong. Rec. at S7309.
[57] *1990 Report*, 5 FCC Rcd at 5302; *1989 NOI*, 4 FCC Rcd at 8375, Appendix B, Table 4 (citing *RADAR 38*, Fall 1988, Vol. 1 at 1). While listening data for children ages 12 to 17 were available, there was little quantitative information about the radio listening habits of children under 12 years of age. The radio ratings data for teens for the different dayparts from 6 a.m. to 12 midnight are set forth in Appendix C hereto.
[58] *See* Appendix C.
[59] *Id.*
[60] *1990 Report*, 5 FCC Rcd at 5302.9
[61] Salem Reply at Exhibit 1.
[62] *See, e.g.*, Bonneville International Corporation Comments in MM Docket No. 89-494 at 6-7; National Religious Broadcasters Reply Comments in MM Docket No. 89-494 at Exhibit 2.
[63] However, a number of parties in MM Docket No. 89-494, in this proceeding and in several indecency enforcement proceedings take issue with our focus on market-wide data, contending that we should look instead to station-specific, program-specific or format-specific audience measurements. This issue is addressed *infra*, ¶ 38.
[64] Bonneville Comments at 5-6 and Exhibits 1-8. Bonneville relied on Arbitron market and station data (spring and summer 1992) for Chicago, Kansas City, Los Angeles, New York, Phoenix, Salt Lake City, San Francisco, and Seattle.
[65] *Id.* at 5 and Exhibit 4.
[66] *Id.* at Exhibit 6.

even in the fringe hours of the late evening and early morning, a substantial number of children are in the listening audience.[67]

2. Accommodating Other Interests

28. We believe that a 12 midnight to 6 a.m. safe harbor time period reasonably balances the compelling interest of protecting children from exposure to indecent broadcast material at all times against the interests of broadcasters and adults. As explained below, this channeling approach is carefully tailored to "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired" and does not "intrud[e] excessively upon the licensee's range of discretion."[68] In addition, although it limits the times of day during which adults wishing to view or listen to indecent material on broadcast television or radio may gain access to such material, the safe harbor regulation does not reduce the adult population to seeing or hearing only what is fit for children.[69] Furthermore, the statute facilitates the supervision of children by their own parents.[70]

a. Broadcasters

29. *Licensee Discretion.* Broadcasters are opposed to the 12 midnight to 6 a.m. safe harbor because they say it effectively deprives broadcasters their freedom to present indecent programs.[71] They claim that since most listeners and viewers are asleep between 12 midnight and 6 a.m.,[72] quality dramatic or satiric programs on mature themes would no longer be economically justifiable if they could be presented only to the small midnight-to-6 a.m. audience. These commenters also believe that broadcasters will be precluded from presenting timely news material if it contains possibly indecent material[73] and renew a request to make news and public affairs programs entirely exempt from indecency enforcement.[74] Pacifica believes that our enforcement policy should be modified to take into account a broadcaster's good faith judgment and to exclude "meritorious programs" from indecency enforcement action.[75]

30. We do not believe that expanding our indecency enforcement to 12 midnight will foreclose all indecent programming or infringe upon a licensee's discretion to present timely news stories or meritorious programming. The commenters' argument assumes that some "quality dramatic or satiric programs on mature themes" or late-breaking news cannot be presented without containing patently offensive depictions or descriptions of sexual or excretory activities or organs. As the plurality of the Court in *Pacifica* noted, "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[76] Moreover, in addition to the safe harbor time period, programmers may present their indecent audio or video fare through multiple alternative media, such as audio and video tapes, cable television, wireless cable or subscription satellite television services.[77]

31. Furthermore, the suggestion that licensee discretion over news coverage and "meritorious programs" would be infringed by extending the hours during which indecent programs are actionable ignores the recognized importance of "context" in indecency determinations.[78] As we have indicated, the subject matter alone or the use of particular words or phrases does not render material indecent.[79] This argument also disregards the Commission's policy of "giv[ing] weight to reasonable licensee judgments when deciding to impose sanctions in a particular case."[80] Although in exercising its judgment a licensee is always subject to the risk that a complaint could be filed, that a Commission investigation could ensue and that even a forfeiture penalty could be assessed, the licensee is guaranteed the substantive and procedural safeguards of our indecency enforcement policies and, in most circumstances, the statutory right to a trial *de novo* in U.S. District Court if it so desires.[81]

32. *Notice.* The benefit of articulating the 12 midnight to 6 a.m. channeling approach as part of our indecency enforcement policy is that it presents "a clearly-stated position enabling broadcasters to comprehend what is expected of them and to conform their conduct to the legal requirement."[82] Section 16(a) eliminates the uncertainty of when

---

[67] Pacifica submitted a study which finds that children generally use radio differently than adults and only gradually learn to use radio as a medium. Pacifica Comments at 6-7 and Attachment A. Nothing in this study would cause us to reach a different result here. Comparing how different age groups listen to the radio generally, or to stations with specific formats, does not disprove the fact that there are substantial numbers of children in the listening audience. Even if more adults listen to commercial or public radio, the available evidence shows that children make up a substantial portion of the radio audience. Moreover, despite commenters' challenge, there is no evidence that public stations are inaccessible to children who scan the radio dial, rapidly tuning (or "grazing") through the entire range of channels.

[68] *ACT I*, 852 F.2d at 1343, 1344.

[69] *See Sable*, 492 U.S. at 126-27 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

[70] *See ACT I*, 852 F.2d at 1343.

[71] Broadcasters Comments at 8-9.

[72] Broadcasters note that, according to ratings data, the audiences for network-affiliated television broadcast stations and for radio stations drops sharply after midnight. *Id.* at 8n. 3.

[73] Broadcasters cite as an example news coverage of an angry demonstration or a celebrated trial which would lose its immediacy if not broadcast until many hours after the fact. *Id.* at 8.

[74] *Id.* at 8-9 n.4 . *See Infinity Reconsideration*, 3 FCC Rcd at 931.

[75] Pacifica Comments at 7-11.

[76] 438 U.S. at 743 n.18.

[77] *See 1990 Report*, 5 FCC Rcd at 5308-09.

[78] *See Infinity Reconsideration*, 3 FCC Rcd at 930.

[79] *See, e.g., King Broadcasting Co.*, 5 FCC Rcd 2971 (1990) (dismissing complaint where "[a]lthough the program dealt with sexual issues, the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner or in any way that we would consider patently offensive."). *See also Letter to Mr. Peter Branton*, 6 FCC Rcd 610 (1991), *appeal pending*, No. 91-1115 (D.C. Cir. oral argument held September 9, 1992) (dismissing complaint against bona fide news broadcast and stating: "No terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances.").

[80] *See ACT I*, 852 F.2d at 1340 n.14; 47 U.S.C. § 503(b)(2)(D).

[81] *See* 47 U.S.C. § 504.

[82] *ACT I*, 852 F.2d at 1344.

(possibly) indecent material can be safely aired. Any further uncertainty as to whether a particular broadcast would be deemed actionable indecency can be minimized by a licensee's examination of how we have applied our generic definition of indecency in past enforcement actions. Moreover, licensees are aware that no language or material is *per se* indecent and that any remaining question as to whether a certain broadcast would be subject to possible sanctions will beultimately resolved by the Commission on a case-by-case basis when we consider, *inter alia*, the context in which the possibly indecent material was broadcast and reasonable licensee judgments. If, in the licensee's judgment, the material may be deemed actionable indecency under our definition and precedents, the licensee may choose to air it during the safe harbor or exercise other editorial discretion over the material's form and content.

33. *Accommodating Public Broadcasters.* Section 16(a) provides a limited exception to the 12 midnight to 6 a.m. prohibition on indecent broadcasts. "In order to accommodate public television and radio stations that go off the air at or before 12 midnight, the FCC's enforcement authority would extend [to] the hour of 10 o clock p.m. for those stations."[83] In balancing the interests at stake, it appears reasonable to afford public broadcasters that do not operate during the regular safe harbor time period at least some opportunity to air indecent material as opposed to forcing them to extend their broadcast day beyond that which is economically feasible. Congress carved out this exception apparently as a kind of "rough accommodation" of its concerns for public broadcasters.[84] Congress is entitled to make such judgments so long as it does not place obstacles in the path of a person's exercise of freedom of speech.[85] In this case, the choice to provide a special accommodation for a number of public broadcasters[86] is not unreasonable. Moreover, we note that public stations operate on limited budgets.

b. Adult Listeners and Viewers

34. The safe harbor regulations we adopt today do not reduce the adult population to seeing or hearing only what is fit for children.[87] Through Section 16(a) Congress has affirmatively decided that adults may gain access to indecent material broadcast after 12 midnight, when it believes "the risk of children in the audience would at least be lessened."[88] Moreover, as we demonstrated in the *1990 Report*, indecent material is available on media that are largely indistinguishable, from the viewer's perspective, from broadcast television, although their characteristics facilitate limiting access only to consenting adults.[89] Accordingly, we do not believe that the regulations we adopt today impermissibly infringe on adults' First Amendment rights.

c. Parents

35. The 12 midnight to 6 a.m. channeling scheme also accommodates the interests of parents, who are entitled to decide whether their children should be exposed to indecent materials. On the one hand, parents who allow their children to have access to such material may choose to do so through other less pervasive media or by permitting them to use the broadcast media during the safe harbor hours. On the other hand, however, the restriction on indecent broadcasts accommodates the interests of parents who wish to limit their children's access to indecent broadcasts.

36. The record in MM Docket No. 89-494 revealed that the pervasiveness and accessibility of television and radio, coupled with the lack of effective parental control mechanisms, make parental supervision exceedingly difficult if not impossible for the average parent.[90] The record also showed that parents' control of children's television viewing and radio listening differs from parental control of cable viewing and telephone calls.[91] Technical means are readily available to block children's access to indecent cable programs and indecent telephone calls. By contrast, parents cannot rely on technical devices to prevent children from viewing indecent programs on broadcast radio and television. We thus concluded that parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching and listening at all times.[92] However, many concerned parents filing comments in the previous proceeding emphasized that it is not practical for parents to exercise this type of control during all times of the day. While our concerns in this regard have not diminished, as we have explained, in light of the serious constitutional issues at stake here and the need to balance all interests, we conclude that the channeling approach to broadcast indecency enforcement directed by Section 16(a) is reasonable.

3. Defense to Commission Action

37. In the *1990 Report*, we indicated that in enforcing a 24-hour ban on indecent broadcasts we would consider, on a case-by-case basis, evidence from a station charged with indecent broadcasting that there was no actual risk that children were in the broadcast audience in the station's market at the time of the broadcast in question.[93] We tentatively conclude that we will continue to afford broadcasters this defense along with the 12 midnight to 6 a.m. safe harbor. We believe that the submission of market-wide data demonstrating that there is no appreciable child audience during the relevant time period would raise a viable defense to a charge of indecency outside of the safe harbor.

38. We note, however, that in several instances, parties have responded to Letters of Inquiry or Notices of Apparent Liability with data which, they argue, demonstrate that

---

[83] 138 Cong. Rec. at S7308 (statement of Sen. Byrd).
[84] *Compare Dandridge v. Williams*, 397 U.S. 471, 485 (1970).
[85] *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983).
[86] In their comments, Broadcasters note that a majority of public television stations go off the air by midnight and that at least one quarter of public radio stations end their broadcast day at or before midnight. Broadcasters Comments at 18 n.13.
[87] *See Sable*, 492 U.S. at 126-27.
[88] 138 Cong. Rec. at S7308 (statement of Sen. Byrd).
[89] *1990 Report*, 5 FCC Rcd at 5308. While we do not rely on this fact as the sole basis for our conclusion that the balancing of interests directed by Congress is reasonable, we believe, as the Supreme Court noted in *Pacifica*, that availability of such materials through other sources is a factor to be considered. *See Pacifica*, 438 U.S. at 750 n.28; *id.* at 760 (Powell, J., concurring).
[90] *1990 Report*, 5 FCC Rcd at 5305.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 5309.

few or no children were likely to have been listening to their particular station or program when the alleged indecent material was aired.[94] We indicated in the *1990 Report* that such data is not instructive because it does not account for children's grazing.[95] Thus, until we have been presented with convincing factual evidence showing that program- or station-specific data is relevant in view of the grazing problem, we continue to believe that showings relying on such data would be inadequate as defenses.

IV. Procedural Matters and Conclusion

A. Request for Stay

39. In their comments, Broadcasters have requested a broad stay of the Commission's indecency enforcement activities pending judicial review of the new, statutorily mandated "safe harbor" regulations. Specifically, these commenters seek a stay that maintains the present 8 p.m. to 6 a.m. safe harbor. In addition, they would have the Commission suspend indecency enforcement action against "programs with no appreciable child audience" even if aired outside the current safe harbor.

40. The general factors to be considered in deciding whether to stay an action are: (1) whether the petitioner is likely to prevail on the merits of its appeal; (2) whether, without such relief, the petitioner will be irreparably injured; (3) whether issuance of a stay would harm other parties interested in the proceeding; and (4) whether such relief is in the public interest.[96] In this case, Broadcasters have not pleaded these factors and, in our view, their reasons for granting a stay have no merit. Moreover, Congress has directed that the regulations required under Section 16(a) shall become final not later than February 22, 1993. Under these circumstances, Broadcasters' stay request is denied.

B. Final Regulatory Flexibility Analysis

41. *Need and purpose of this action.* The regulations adopted by this *Report and Order* are required by Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992). As directed by this statute, the Commission has adopted regulations that establish the times of day during which indecent programming may not be broadcast on radio and television stations.

42. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis.* No comments were filed in response to the Initial Regulatory Flexibility Analysis.

43. *Significant Alternatives Considered and Rejected.* We have found that the broadcast indecency channeling program adopted by this *Report and Order* most effectively serves the compelling interest of protecting children from exposure to indecent broadcast material without intruding excessively on the rights of those entitled to present or receive such material. We therefore believe that the means chosen is the least restrictive available for the broadcast medium and that other alternatives cannot effectively further this interest.

C. Ordering Clauses

44. Accordingly, IT IS ORDERED That the comments filed by Morality in Media ARE ACCEPTED as a permissible *ex parte* presentation.

45. IT IS FURTHER ORDERED THAT the stay requested by Broadcasters IS DENIED.

46. IT IS FURTHER ORDERED That, pursuant to Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992), and Sections 4(i) and (j), 303 and 312 of the Communications Act of 1934, as amended, (47 U.S.C. §§ 154(i) and (j), 303, 312), Section 73.3999 of the Commission's Rules (47 C.F.R. § 73.3999) IS AMENDED, as set forth in Appendix A, EFFECTIVE 30 DAYS from the date of publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A -- AMENDATORY TEXT

Part 73, Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73 -- RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 73.3999 is revised to read as follows:

§ 73.3999 Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a public broadcast station, as defined in 47 U.S.C. 397(6), that goes off the air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

(c) No licensee of a radio or television broadcast station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.

---

[94] *See, e.g., Sagittarius Broadcasting Corp.*, 7 FCC Rcd 6873, 6875-76 (M.Med.Bur. 1992).

[95] 5 FCC Rcd at 5309. The practice of random tuning behavior, by which listeners and viewers use the radio or television dial, or a remote control device, to rapidly tune through the entire channel menu in a short period of time, is known as "grazing." Such rapid tuning may not be reflected in a station's or program's ratings data. *Id.* at 5307.

[96] *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

APPENDIX B -- Commenters

Comments

The following parties filed comments on November 6, 1992:

Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Capital Cities/ABC, Inc, CBS, Inc., Fox Television Stations, Inc., Greater Media, Inc., Infinity Broadcasting Corporation, Motion Picture Corporation of America, Inc., National Association of Broadcasters, National Broadcasting Co., Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists ("Broadcasters").

Bonneville International Corporation ("Bonneville").

Infinity Broadcasting Corporation ("Infinity").

The Pacifica Foundation, National Federation of Community Broadcasters, American Public Radio, National Association of College Broadcasters, and PEN American Center ("Pacifica").

Other Submissions

Letter from Jill K. Ferlita, received October 22, 1992.

Letter from Americom Broadcasting, received November 9, 1992.

Morality in Media Comments, received December 4, 1992.

Reply Comments

No reply comments were filed.

APPENDIX C -- Radio Ratings Data in MM Docket No. 89-494

Audience Estimates for All Radio Stations by Selected Daypart

Estimated total population of children (ages 12-17): 20,254,000

6 a.m. to 12 midnight	Children (12-17)	Percentage of All Children	Total Persons (12+)	Children as % of Total Aud.
Average quarter-hour	2,437,000	12.0	29,573,000	8.2
Average one day cume	16,638,000	82.2	151,622,000	11.0
Seven day weekly cume	20,145,000	99.5	190,105,000	10.6
6 a.m. to 10 a.m.				
Average quarter-hour	2,442,000	12.1	38,454,000	6.4
Average one day cume	10,190,000	50.3	107,081,000	9.5
Seven day weekly cume	18,301,000	90.4	173,118,000	10.6
10 a.m. to 3 p.m.				
Average quarter-hour	1,891,000	9.3	35,595,000	5.3
Average one day cume	7,072,000	34.9	85,405,000	8.3
Seven day weekly cume	17,318,000	85.5	167,369,000	10.3
3 p.m. to 7 p.m.				
Average quarter-hour	2,815,000	13.9	30,191,000	9.3
Average one day cume	9,195,000	45.4	86,105,000	10.7
Seven day weekly cume	18,427,000	91.0	164,441,000	11.2
7 p.m. to 12 midnight				
Average quarter-hour	2,677,000	13.2	15,949,000	16.7
Average one day cume	9,244,000	45.6	54,850,000	16.9
Seven day weekly cume	17,923,000	88.5	130,550,000	13.7
12:00 midnight to 6:00 a.m.				
Average quarter-hour	716,000	3.5	6,960,000	10.3
Average one day cume	3,533,000	17.4	35,432,000	10.0
Seven day weekly cume	10,896,000	53.8	86,313,000	12.6

Source: RADAR 38, Fall 1988, Vol. 1 at 1, filed in MM Docket No. 89-494, January 26, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
and BILL NELSON

Against Station WTVT(TV),
Tampa, Florida

Further Discovery Order

Adopted:January 21, 1993; Released: January 21, 1993

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a "Request for Further Discovery" ("Request") filed on December 16, 1992, on behalf of Lawton Chiles, Bob Martinez, and Bill Nelson ("Complainants"), seeking an additional twenty-seven interrogatories and seven categories of documents, and depositions of thirty-eight individuals, from WTVT(TV), Tampa, Florida. On December 21, 1992, WTVT filed an opposition to Complainants' Request, arguing that the additional discovery is unjustified and beyond the scope of this proceeding.[1] On December 28, 1992, Complainants filed a "First Supplemental Request for Further Discovery" ("First Supplemental Request"), essentially reiterating their request to depose 23 of the original 38 individuals from whom deposition testimony was sought, and seeking permission to depose an additional five individuals. On December 31, 1992, WTVT filed an opposition to Complainants' First Supplemental Request. On January 4, 1993, Complainants filed a "Second Supplemental Request for Further Discovery" ("Second Supplemental Request"), reiterating their request to depose 16 of the 43 individuals from whom deposition testimony was previously sought, and seeking to depose two additional individuals. On January 7, 1993, WTVT filed an opposition to Complainants' Second Supplemental Request.[2]

2. For the reasons set forth below, we grant in part Complainants' requests for further discovery. Specifically, we order WTVT to respond to the interrogatories set forth in Appendix A to this *Further Discovery Order* and produce the documents set forth in Appendix B. However, we deny Complainants' request for depositions. Following are the Bureau's specific findings with respect to the additional discovery requested by Complainants.

DISCUSSION

3. In the original *Order* in this proceeding, we stated that further discovery by Complainants "will not be permitted as a matter of course, but only upon a showing that such discovery is necessary to resolution of the issues upon which discovery has been granted."[3] The single issue on which discovery was allowed is whether candidates were overcharged during the 1990 lowest unit charge periods.

4. *Preemption*. Complainants request further discovery related to the issue of preemption and classes of time, including three general interrogatories (1-3), thirteen specific interrogatories related to documents already produced by WTVT (11-13, 15-16, 18-19, 21-24, 26-27), and two categories of documents (1-2).[4] In support, Complainants argue that preemption experience and probabilities are at the heart of class-based rate distinctions, and that documents produced by WTVT indicate that preemption decisions are not based on price alone. Complainants in their Second Supplemental Request include documents which purportedly demonstrate that commercial advertisers purchased spots at rates lower than the political fixed rate -- making these spots preemptible[5] -- yet they were not preempted (except in one instance). Complainants argue that, in these instances, there was no genuine risk of preemption, and the spots were functionally the equivalent of non-preemptible spots. Finally, Complainants' proposed interrogatories raise additional questions regarding classes of time, including: (1) whether commercial spots purchased as part of a broad rotator ran consistently at favorable

[1] On December 21, 1992, WTVT filed a notification that it does not currently require any discovery of the Complainants. However, WTVT reserves its right to conduct discovery should the Commission allow Complainants to expand their amended complaint beyond the single issue of overcharges during the 1990 lowest unit charge periods.

[2] WTVT argues that Complainants have cloaked within paragraph 7 of their Second Supplemental Request an unauthorized reply to WTVT's opposition to their initial Request. We agree that Complainants' paragraph 7 constitutes an unauthorized reply, and thus will not be considered herein. However, as to the balance of Complainants' First and Second Supplemental Requests, we note that these filings were apparently compelled by WTVT's production of documents pursuant to the *MO&O* after the established deadline. Thus, while as a general matter we strongly discourage the filing of pleadings beyond what was specifically provided for by the Commission in this proceeding, *see Order*, 7 FCC Rcd 6661 (MMB), *recon. denied, Memorandum Opinion and Order*, FCC 92-528 (released November 30, 1992), under the narrow circumstances of this case, we will consider herein Complainants' First and Second Supplemental Requests, with the exception of paragraph 7 of the Second Supplemental Request.

[3] 7 FCC Rcd at 6665. This language in the *Order* is consistent with the *Declaratory Ruling* in *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, which contemplated only "limited discovery subject to specific conditions." 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992).

[4] The numbers in parenthesis refer to the numbers assigned by Complainants to the further interrogatories, documents, and depositions they have requested. For reference purposes, the further discovery proposed by Complainants is set forth in Appendix C.

[5] According to Complainants, class of time is not readily ascertainable from the documents produced by WTVT. In response to an interrogatory, WTVT reportedly advised Complainants that identification of classification of time can only be determined by comparing the rate purchased with the ratecard/availabilities. Thus, Complainants have apparently concluded that the commercial spots at issue were preemptible.

times (see interrogatory 16); and (2) why commercial spots did not clear even though lower-priced spots in the same time period did clear (see interrogatories 22-23).[6]

5. WTVT responds, in part, that the Commission has already recognized that WTVT did not attempt to establish classes of time based on probability of preemption, citing to the *Order*.[7] In any event, WTVT argues, the Commission in 1990 did not recognize the use of probability of preemption as a basis for creating separate classes of time.[8] WTVT also asserts that the Bureau and the Commission foreclosed inquiry into "WTVT's disclosure of its preemption policies." Finally, WTVT claims that there is no support for Complainants' apparent contention that a commercial spot which in fact was not preempted could not be sold as preemptible.

6. Section 315(b)(1) of the Communications Act of 1934, as amended, directs broadcasters to charge legally qualified candidates for public office the lowest unit charge of the station for the same *class* and amount of time for the same period. 47 U.S.C. Section 315(b)(1). Under this statute, broadcasters do not have total discretion to define the classes of time they offer to candidates, as this would allow stations to exclude candidates from the discount privileges offered commercial advertisers. *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981). The Court in *Hernstadt* stated:

> If broadcasters have total discretion to define "class of time," however, they will be free to return to pre-1952 rate discrimination simply by defining a "political" class of time, with higher rates than other classes, and then offering candidates only "political" time.

Id. at 900. On September 13, 1990, the Bureau released a "Political Programming Q & A," which provided that:

> [A] broadcaster cannot create a "non-preemptible" class of time that it knows only candidates will purchase when commercial advertisers are able to buy a less expensive "preemptible" class that in reality offers virtually the same benefits and value as the more expensive "non-preemptible" class. Put differently, broadcasters must charge candidates and commercial advertisers the same rate for functionally equivalent classes of time.

In short, where a station establishes on paper two separate classes of time, but those two classes of time, in practice, are the same class because the benefits and values of each are virtually the same, candidates have been overcharged if they paid more than commercial advertisers purchasing time in the same time period.

7. It is apparent from the record before us that discovery on the issue of WTVT's policies and procedures pertaining to preemption and classes of time is necessary to resolving the issue of overcharges. In particular, the documents provided by Complainants in their Second Supplemental Request indicate that, in at least some instances, WTVT's preemptible class of time may have been treated as the functional equivalent of fixed time. The information contained in certain of Complainants' proposed interrogatories similarly indicates that the defining characteristics of WTVT's classes of time may have been ignored for commercial advertisers. For these reasons, we hereby grant discovery on Complainants' interrogatories 2-3,[9] 11-13, 15,[10] 16, 18-19, 21-23, 26, and document categories 1-2. However, as set forth in Appendix C, we have modified Complainants' requested interrogatories, where appropriate, to ensure that discovery remains within the scope of the relevant issue.[11]

8. WTVT's arguments against allowing discovery on the issue of preemption/classes of time fail to reflect a proper understanding of the concepts of preemption and classes of time. While the Commission noted that WTVT's rate card indicated that the price of spots sold by WTVT was based on demand, this did not preclude distinctions between classes based on whether or not spots are subject to preemption. While the Commission in 1990 did not recognize the use of probability of preemption as a basis for creating different classes of *immediately* preemptible time,[12] it certainly recognized differences between preemptible and non-preemptible time based on preemption. In addition, while the Commission in this proceeding foreclosed inquiry on

---

[6] WTVT argues that interrogatories 22 and 23 pertain to the issue of denial of access to commercial advertisers, and thus are not relevant to the subject inquiry. While these interrogatories may be relevant, in part, to the issue of access, it is apparent that they are also highly relevant to the issue of overcharges. WTVT in its March 2, 1992, answer to the complaint that initiated this proceeding stated that, "WTVT's rates are set on the basis of supply and demand." Under this approach, we can assume that preemptible spots would be subject to preemption if demand for a given time period is high, and an advertiser offers to pay more for a spot than other advertisers within that time period. If preemptible spots are not subject to preemption by higher-priced spots, then these would be functionally fixed, and not preemptible. If candidates paid more for fixed spots than commercial advertisers purchasing spots that are the functional equivalent of fixed, candidates were overcharged.

[7] 7 FCC Rcd at 6664-65. The Bureau recognized therein that WTVT's ratecard provided that the price of spots sold by the station was based on demand.

[8] For support, WTVT cites to the *Report and Order* in *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 690 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992).

[9] The first sentence of Complainants' interrogatory 1 has been combined with Complainants' interrogatory 3(a). Complainants have failed to justify the need for the information requested in the second sentence of Complainants' interrogatory 1.

[10] Complainants' interrogatory 15 cites to documents produced by WTVT which include references to "trade value" and "cash value." WTVT argues that trade-outs and barter deals have never been considered in calculating a station's lowest unit charge. This statement is not entirely correct. Trade deals that involve a combination of trade or barter *and* cash would be included in a station's lowest unit charge. *The Law of Political Broadcasting and Cablecasting: A Political Primer 1984 Edition*, 100 FCC 2d 1476, 1517 (1984).

[11] Because this is the first case to be processed under the procedures established in the *Declaratory Ruling*, we have modified Complainants' interrogatories rather than dismissing them as beyond the scope of discovery. However, in the future, we will dismiss such interrogatories rather than modifying them to ensure that they are within the scope of the issue(s) established for discovery. Thus, we strongly advise future complainants to carefully craft their proposed discovery, and provide *detailed* justification for each section or subpart of a proposed interrogatory or document category, where necessary.

[12] *Political Programming Policies*, 7 FCC Rcd at 691.

the issue of *disclosure* of WTVT's preemption policies,[13] it did not foreclose inquiry on the issue of preemption as it is related to the accurate determination of class of time relevant to the issue of overcharges. Finally, while WTVT is correct in asserting that a preemptible spot does not lose its class designation just because it is not preempted, Complainants have raised a question whether a *pattern* of non-preemption by WTVT has essentially obliterated the distinction between preemptible and non-preemptible time.

9. We are not allowing discovery on Complainants' interrogatories 24 and 27. Complainants have failed to adequately justify the need for information related to separations between spots, as requested in interrogatory 24. The Commission has never ruled that a station's promise to provide adequate separation between spots advertising similar products or services is relevant to the issue of lowest unit charge.[14] In addition, Complainants have not submitted any contracts or invoices to support their claim that "a number" of contracts or invoices include the term "maximum separation." Similarly, interrogatory 27 should not be allowed because Complainants failed to provide any basis for their speculation that advertisers on WTVT "often" received credits for late run spots.[15]

10. *No-Charge and Bonus Spots.* Complainants request further discovery on the issue of no-charge and bonus spots provided by WTVT, including six general interrogatories (4-9), four specific interrogatories related to documents produced by WTVT (14, 17, 20, 25), and four categories of documents (3-6). Complainants argue that no-charge and bonus spots may, under some circumstances, set the lowest unit charge and that, at a minimum, such spots may be used to reduce the lowest unit charge.[16]

11. The Commission's policy in 1990 with respect to free spots was as follows:

> Normally, if a station offers free "bonus" spots to an advertiser as an inducement to buy spots on the station, the bonus spots will be considered as sponsored and must be included in computing that station's charge for spots to the advertiser. Thus, if a station sells 10 spots at $10 each to an advertiser but promises him an additional 10 spots "free," the average price per spot for "lowest unit charge" purposes will be $5 instead of $10.

1984 Political Primer, 100 FCC 2d at 1517. We are unaware of any policy in effect in 1990, and Complainants do not cite to any such policy, whereby a no-charge or bonus spot would itself establish the lowest unit charge for that class of time or time period. Thus, at most, the use of no-charge or bonus spots would be relevant as one factor to be used in calculating the lowest unit charge of the station.

12. We note that the Commission has already ordered WTVT to produce documents pertaining to no charge and bonus spots.[17] Complainants do not demonstrate why additional general discovery on the issue of no-charge and bonus spots is needed, beyond that already required in the *MO&O* . Thus, Complainants' request for further discovery will be denied with respect to general interrogatories 4-9 and document categories 3-6.

13. However, we will allow discovery on interrogatories 14, 17, 20, and 25, which request clarification or further information with respect to documents produced by WTVT.[18] WTVT correctly argues that make goods provided for failure to deliver expected audience numbers, demographics, or ratings,pneed not be included in lowest unit charge calculations.[19] However, it is not clear that the notations in the documents at issue pertain to make goods provided for one of these reasons. We particularly question the meaning of the notation "NC due to poor rotation" in interrogatory 14. We will therefore require WTVT to respond in greater detail to these interrogatories. Similarly, WTVT should explain the circumstances surrounding the change in the designation of spots from paid to "NC" that is recounted in interrogatory 25.

14. *Previous Discovery Order.* In interrogatory 10 and document production category 7, Complainants ask the Bureau to order WTVT to produce all of the discovery required in the *MO&O*. In particular, Complainants question whether WTVT has complied fully with interrogatories 3 and 4 in Appendix B, and document categories 2-5 in Appendix A. WTVT responds as follows:

> In order to cooperate with colorably legitimate requests by the Complainants for further discovery, WTVT has already provided numerous additional documents and responded to an additional interrogatory pursuant to informal requests of Complainants' counsel. In that light, the tenth interrogatory and the seventh category of documents which Complainants now request to be produced are moot, as WTVT has

---

[13] *Order*, 7 FCC Rcd at 6664.

[14] In fact, it is unclear whether separation, which may be attractive to commercial advertisers, would be equally attractive to political advertisers. Some candidates conceivably could want a particular advertisement to run immediately adjacent to the advertisement of an opposing candidate.

[15] If Complainants had submitted to us documents which demonstrated that WTVT was providing commercial advertisers with credits for late run spots, we would have asked WTVT to clarify the meaning of this statement, and explain under what circumstances such credits are provided.

[16] While WTVT objected generally to Complainants' entire request as unjustified and abusive, WTVT did not specifically argue against general interrogatories 4-9 pertaining to no-charge and bonus spots.

[17] The *MO&O* specifically requires WTVT to produce:

> (b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during these periods...
>
> (e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who puchased time that ran during these periods....

[18] As noted above, this *Further Discovery Order* modifies Complainants' interrogatories, where necessary, to ensure that discovery remains within the scope of the relevant issue.

[19] Moreover, we note that, in *Political Programming Policies*, the Commission specifically held that it would "*continue* to permit exclusion from make-good calculations any make goods or bonus spots furnished to meet contracted-for promises of certain audience numbers, demographics, or ratings..." (emphasis added). 7 FCC Rcd at 697.

already produced some of these materials and has expressed in writing to Complainants' counsel its intent to search for and produce the others.

From the materials provided by Complainants, it does not appear that interrogatories 10 and document production category 7 pertain to "further discovery," as characterized by WTVT, but rather to discovery specifically ordered in the *MO&O*. It further appears that WTVT may not be providing complete responses to interrogatories and document production. We therefore order WTVT to comply *fully* with the *MO&O*. In particular, WTVT should explain in greater detail, pursuant to interrogatory 4, the alpha/numeric codes used by the station to distinguish different types of advertising. According to Complainants, WTVT in its initial response to interrogatory 4 provided a one sentence description for each of two code ranges, 2-15 and 20-24, and then stated that, "The alpha/numeric codes distinguished different types of advertising and were occassionally used incorrectly." This response by WTVT is incomplete and lacks specificity. For example, WTVT should distinguish between each of the codes within the range of 2-15 and 20-24. In addition, WTVT should explain its statement that these codes were "used incorrectly," and indicate the circumstances in which the codes were incorrectly utilized.

15. WTVT should also provide Complainants with a statement pursuant to interrogatory 3 which indicates the class of *each* commercial spot aired by it during the relevant time periods. Complainants allege that class of time is "not readily ascertainable from the documents produced by WTVT. WTVT apparently advised Complainants that class of time can be determined by comparing the rate of the spot purchased with the ratecard/availabilities. However, this answer is not fully responsive to interrogatory 3, which specifically required WTVT to provide a statement that indicates the class of each spot, if not apparent from the program logs, invoices, or contracts. We caution WTVT that we will look with extreme disfavor on future discovery responses that are vague, incomplete, or untimely.

16. *Depositions.* In total, Complainants seek to depose 45 witnesses. Complainants argue that depositions are necessary to determine both the actual and functional classes of spots sold, and thus to determine whether rebates are due. The individuals from whom deposition testimony is sought allegedly either: (1) sold time to commercial advertisers at rates less than rates paid by political advertisers; or (2) were involved in management of the station and/or in overseeing steps to ensure compliance with lowest unit charge requirements.

17. WTVT urges the Commission to deny Complainants' entire request for depositions as patently abusive.[20] WTVT argues that Complainants have not demonstrated the need for depositions, and have not determined and properly identified those individuals having knowledge relevant to the specific matters in question. Finally, WTVT argues that Complainants have not complied with the Commission's procedural requirements for the noticing of depositions, citing to the *Order*, 7 FCC Rcd at 6666 n.27.

18. In the *Order*, the Bureau specifically provided that further discovery would be allowed in the form of additional documents, answers to interrogatories, "or for the taking of depositions." 7 FCC Rcd at 6665. Thus, depositions in this proceeding were made potentially available, but only upon a proper showing.

19. Complainants here have failed to establish the proper showing, in that they have not demonstrated why depositions of any of the 45 individuals proposed are necessary to resolution of the issue of overcharges. In addition, we fail to see how depositions are necessary as an additional mechanism for discovery in light of the further interrogatories and document production which we are ordering, as explained in greater detail, above. For these reasons, we are denying Complainants' request for depositions.

20. Should Complainants still take the position, after reviewing the further interrogatories and documents that are produced pursuant to this *Further Discovery Order*, that depositions are necessary to resolution of the issue of overcharges, they will not be foreclosed from filing a subsequent request for depositions. However, should Complainants' file a subsequent request, they will face a two-part hurdle. First, Complainants will have to seek an extension of the 60-day discovery period by making a detailed, supported, good cause showing for grant thereof. Second, Complainants will have to demonstrate, with respect to *each* witness they seek to depose, that the individual's testimony is necessary to resolution of the issues upon which discovery has been granted.[21] Such showing must include *specific* arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence. Absence of an adequate showing with respect to either of these elements will result in denial of Complainants' request for depositions.

21. In light of the foregoing, we find that Complainants' Request, First Supplemental Request, and Second Supplemental Request, should be GRANTED to the extent indicated herein and DENIED, in all other respects. Such denial shall be without prejudice with respect to Complainants' various requests for depositions.

---

[20] WTVT cites to *Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 440, 443-44 (Rev. Bd. 1985) ("*Fessenden* "), in support of its claim that Complainants' request is patently abusive. In *Fessenden*, the Review Board quashed deposition notices due to the number of parties in the proceeding (nine) and the short period of time allowed for discovery (90 days). In the instant proceeding, unlike in *Fessenden*, while only two parties are involved, one of the parties requests permission to depose 45 individuals. Moreover, as in *Fessenden*, only a limited time period has been afforded for discovery -- in this case 30 days less than the period allowed for in *Fessenden*.

[21] However, we caution Complainants that we cannot currently comprehend how the deposition testimony of *45* individuals would be necessary to resolution of the issue of overcharges, particularly where the Commission has clearly established that only *limited* discovery will be allowed in these cases.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A
FURTHER INTERROGATORIES TO BE PROVIDED TO COMPLAINANTS

Answers to the following interrogatories shall be provided to Complainants in accordance with the procedures set forth in the *MO&O* in this proceeding. The deadline for production of further discovery established in the *MO&O* is February 1, 1993.

1. Completely and comprehensively state each and every factor considered by WTVT in determining whether a particular commercial or political advertisement would be preempted in 1990.

2. In reference to the preemption of political and commercial advertising on WTVT during 1990:

a. provide the name and job title of all employees who were involved in preemption decisions;

b. state what documents would be generated by the station to record the fact of preemption;

c. state what documents would be generated by the station to inform the advertiser of preemption;

d. state what guidelines or rules (written or oral) have been developed by WTVT for use in making preemption decisions.

3. Explain the meaning of the following statements contained in various documents referenced by Complainants in their Request for Further Discovery. In addition, explain how the statement at issue affected WTVT's policies or practices pertaining to preemption, classes of time, and/or the lowest unit charge of the station for preemptible and/or nonpreemptible time.

a. "THE RATES PURCHASED ON THE STATION ARE NEGOTIATED RATES AND AS SUCH ARE SUBJECT TO PREEMPTION WITHOUT PRIOR NOTIFICATION. ALL ATTEMPTS WILL BE MADE TO WORK WITH ADVERTISERS IN RESCHEDULING LIKE MAKE-GOODS FOR PREEMPTED SPOTS, BUT CREDITS MAY BE ISSUED IN CIRCUMSTANCES WHERE MAKEGOODS CANNOT BE GIVEN." (See Complainants' proposed interrogatory 11.)

b. "THESE RATES ARE CONFIRMED AS ORDERED AND, AS SUCH, NOT SUBJECT TO PRE-EMPTION BY A HIGHER RATE ADVERTISER. HOWEVER, THESE COMMERCIAL AVAILABILITIES ARE SUBJECT TO CHANGE OR CREDIT DUE TO PROGRAM CHANGES, PRODUCT OR ADVERTISER CONFLICT, OR CIRCUMSTANCES BEYOND STATION'S CONTROL." (See Complainants' proposed interrogatory 12.)

c. "SPTS NON PRE-EMPTABLE DUE TO ONE FOR THE CHILDREN SPONSORSHIP." (See Complainants' proposed interrogatory 13.)

d. "NC DUE TO POOR ROTATION." (See Complainants' proposed interrogatory 14.)

e. "ADD TO SKED PER CONVERSATION WITH MIKE 12/18, DUE TO DEMO UNDERACHIEVEMENT." (See Complainants' proposed interrogatory 17.)

f. "OUR ACCESS & LF. ARE HIT LISTED ALSO DUE TO POLITICAL OUR NEWS CPP WAS $325-350 AND PRIME WAS $300+." (See Complainants' proposed interrogatory 18.)

g. "COULDN'T MEET LOW TAPS DUE TO POLITICALS." (See Complainants' proposed interrogatory 19.)

h. "NC DUE TO TECH. ERROR AND POINTS." (See Complainants' proposed interrogatory 20.)

i. "Sept? Bob? political." (See Complainants' proposed interrogatory 21.)

4. Please explain references in various WTVT documents to "trade value" and "cash value." (See Complainants' proposed interrogatory 15.) Indicate whether cash was involved in any transactions involving trade or barter, and whether the rates for such transactions were used to determine lowest unit charge.

5. Certain WTVT invoices indicate that a broad rotator, 6a-2a, was ordered on a consistent basis, and that most of the spots ran between 4 p.m. and 7 p.m., and 9 p.m. and 12 midnight. (See Complainants' proposed interrogatory 16.) Please explain why the spots in this instance ran at apparently favorable times, and explain generally WTVT's method of placing spots in "broad" rotators.

6. Explain why two WTVT invoices indicate "no avails" where other advertisers purchased time in the same time period for less than the amount indicated in the invoices. (See Complainants' proposed interrogatories 22-23.) Explain why it appears that an advertiser ordering the spot at a higher price was preempted, while the other advertisers were not preempted.

7. Explain why an advertiser on WTVT received three "NC" spots that had originally been ordered at $500 per spot. (See Complainants' proposed interrogatory 25.) Also, explain the use of "NC" under these circumstances.

8. A WTVT order worksheet indicates that an advertiser requested a position "inside" a show. (See Complainants' proposed interrogatory 26.) Please indicate whether this request makes the spot a "fixed" spot, and the impact such a request has on lowest unit charge.

APPENDIX B
FURTHER DOCUMENTS TO BE PRODUCED TO COMPLAINANTS

The following documents shall be produced to Complainants by WTVT by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in the *MO&O*. The deadline for the production of further discovery established in the *MO&O* is February 1, 1993.

1. All documents specified in the answer to interrogatory 2, including subparts.

2. All documents specifying the basis for preemption policies.

APPENDIX C

COMPLAINANTS' FURTHER DISCOVERY REQUESTS

Interrogatories

Preemptions

1. State the name and job title of every person with responsibility for determining whether a particular commercial or political advertisement would be preempted during 1990. State, if known, the name of the current employer for every person named by you in your answer to this interrogatory.

2. Completely and comprehensively state each and every factor considered by WTVT in determining whether a particular commercial or political advertisement would be preempted during [sic] in 1990.

3. In reference to the preemption of political and commercial advertising on WTVT during 1990:

(a) provide the job titles of all employees who would be involved in preemption decisions;

(b) state what documents would be generated by the station to record the fact of preemption;

(c) state what documents would be generated by the station to inform the advertiser of the preemption;

(d) state what guidelines or rules have been developed by WTVT for use in making preemption decisions;

(e) state the job titles of all employees who would have custody of documents detailing preemption decisions.

No-Charge Spots

4. State the name and job title of every person with responsibility for determining whether a particular commercial or political advertiser would receive a "no charge" spot during 1990. State, if known, the name of the current employer for every person named by you in your answer to this interrogatory.

5. Completely and comprehensively state each and every factor considered by WTVT in determining whether a particular commercial or political advertiser would receive a "no charge" spot during [sic] in 1990.

6. In reference to "no charge" spots received by political and commercial advertisers on WTVT during 1990:

(a) provide the job titles of all employees who would be involved in decisions to provide "no charge" spots;

(b) state what documents would be generated by the station to record the fact of a "no charge" spot;

(c) state what documents would be generated by the station to inform the advertiser of receipt of a "no charge" spot;

(d) state what guidelines or rules have been developed by WTVT for use in making decisions to provide "no charge" spots;

(e) state the job titles of all employees who would have custody of documents detailing "no charge" spots.

Bonus Spots

7. State the name and job title of every person with responsibility for determining whether a particular commercial or political advertiser would receive a bonus spot during 1990. State, if known, the name of the current employer for every person named by you in your answer to this interrogatory.

8. Completely and comprehensively state each and every factor considered by WTVT in determining whether a particular commercial or political advertiser would receive a bonus spot during 1990.

9. In reference to bonus spots received by political and commercial advertisers on WTVT during 1990:

(a) provide the job titles of all employees who would be involved in decisions to provide bonus spots;

(b) state what documents would be generated by the station to record the fact of a bonus spot;

(c) state what documents would be generated by the station to inform the advertiser of receipt of a bonus spot;

(d) state what guidelines or rules have been developed by WTVT for use in making decisions to provide bonus spots;

(e) state the job titles of all employees who would have custody of documents detailing bonus spots.

10. If WTVT maintains that the questions raised in Complainants' letter of December 9, 1992, attached as Exhibit 1, or Complainants' letter of December 14, 1992, attached as Exhibit 2, are not required to be answered by WTVT in connection with the discovery set forth in the *Order* or *Modification of Order*, please answer said questions in response to this interrogatory.

11. A contract, attached as Exhibit 3, provided: "THE RATES PURCHASED ON THE STATION ARE NEGOTIATED RATES AND AS SUCH ARE SUBJECT TO PREEMPTION WITHOUT PRIOR NOTIFICATION. ALL ATTEMPTS WILL BE MADE TO WORK WITH ADVERTISERS IN RESCHEDULING LIKE MAKE-GOODS FOR PREEMPTED SPOTS, BUT CREDITS MAY BE ISSUED IN CIRCUMSTANCES WHERE MAKEGOODS CANNOT BE GIVEN." Please indicate:

(a) How long WTVT has utilized this provision;

(b) The types of contracts for which such a provision is used; and

(c) When a contract does not contain this provision, indicate what the policy is with respect to preemption.

12. A contract, attached as Exhibit 4, provides, "THESE RATES ARE CONFIRMED AS ORDERED AND, AS SUCH, NOT SUBJECT TO PRE-EMPTION BY A HIGHER RATE ADVERTISER. HOWEVER, THESE COMMERCIAL AVAILABILITIES ARE SUBJECT TO CHANGE OR CREDIT DUE TO PROGRAM CHANGES, PRODUCT OR ADVERTISER CONFLICT, OR CIRCUMSTANCES BEYOND STATION'S CONTROL." Please indicate:

(a) How long WTVT has utilized this provision;

(b) The types of contracts for which such a provision is used; and

(c) When a contract does not contain this provision, indicate what the policy is with respect to preemption.

13. An Order Worksheet, attached as Exhibit 5, provides, "SPTS NON PRE-EMPTABLE DUE TO ONE FOR THE CHILDREN SPONSORSHIP." Please explain this provision, and whether these rates were considered in calculating the lowest unit charge for non-preemptible time.

14. An invoice and order worksheet, attached as Exhibit 6, provides, "NC DUE TO POOR ROTATION." Please explain:

(a) The circumstances under which such a discount is provided;

(b) Whether WTVT guarantees "Good" rotation to commercial advertisers purchasing rotators; and

(c) Whether WTVT guarantees "Good" rotation to political advertisers purchasing rotators.

15. Documents for one advertiser, attached as Exhibit 7, refer to "trade value" and "cash value." Please explain the use of the terms "trade value" and "cash value," and how such rates were used to determine lowest unit charge.

16. Invoices, attached as Exhibit 8, indicate that a broad rotator, 6a-2a was ordered on a consistent basis, and that most of the spots ran between 4 p.m. and 7 p.m., and 9 p.m. and 12 midnight. Please explain WTVT's method of placing "broad" rotators.

17. An Order Worksheet, attached as Exhibit 9, indicates, "ADD TO SKED PER CONVERSATION WITH MIKE 12/18, DUE TO DEMO UNDERACHIEVMENT." Please explain:

(a) WTVT's policy for providing free spots as a result of "Demo Underachievement"; and

(b) The impact of rate adjustments for "Demo Underachievement" on lowest unit charge calculations.

18. An Order Worksheet, attached as Exhibit 10, indicates, "OUR ACCESS & LF. ARE HIT LISTED ALSO DUE TO POLITICAL OUR NEWS CPP WAS $325-350 AND PRIME WAS $300 +. Please explain this statement.

19. A contract, attached as Exhibit 11, states, "COULDN'T MEET LOW TABS DUE TO POLITICAL." Please explain this statement.

20. A contract, attached as Exhibit 12, states, "NC DUE TO TECH. ERROR AND POINTS." Please explain:

(a) The meaning of this statement;

(b) The circumstances under which such a discount is provided.

21. A contract, attached as Exhibit 13, contains a handwritten note, "Sept? Bob? political." Please explain the meaning of this note.

22. One advertiser ordered a spot for $2100, and the invoice indicates "NO AVAILS." On the same day, other advertisers cleared for much less than $2100 was preempted, while the other advertisers were not preempted. The documents are attached as Exhibit 14.

23. One advertiser ordered a spot for $1000, and the invoice indicates "NO AVAILS." On the same day, another advertiser cleared at $900. Please explain why the advertiser who paid $1000 was preempted, while the other advertiser was not preempted. The documents are attached as Exhibit 15.

24. A number of contracts and invoices include the term "maximum separation." Please explain the use of this term, and the impact separation guarantees have on rates in general, and lowest unit charge.

25. One advertiser received three "NC" spots that had originally been ordered at $500 per spot. The documents are attached as Exhibit 16. Please explain the use of "NC" under these circumstances.

26. An Order Worksheet, attached as Exhibit 17, indicates that an advertiser request a position "inside" a show. Please indicate whether this request makes the spot a "fixed" spot, and the impact such a request has on lowest unit charge.

27. Advertisers on WTVT often receive credits for "late run" spots. Please explain the policy for credits for late run spots, and how such credits are used to set the lowest unit charge.

Documents

Preemption

1. Provide documents specified in answer to Interrogatory 3, including subparts.

2. Provide any documents specifying the basis for preemption priorities.

No-Charge Spots

3. Provide documents specified in answer to Interrogatory 6, including subparts.

4. Provide any documents specifying the basis for providing no charge spots.

Bonus Spots

5. Provide documents specified in answer to Interrogatory 9, including subparts.

6. Provide any documents specifying the basis for providing bonus spots.

7. If WTVT maintains that documents requested in Complainants' letter of December 9, 1992, attached as Exhibit 1, or Complainants' letter of December 14, 1992, attached as Exhibit 2, are not required to be provided by WTVT in connection with the discovery set forth in the *Order* or *Modification of Order*, please provide said documents pursuant to this request.

Depositions

Request

David Whitaker
Mark Higgins
Mark Demopoulos
Mike Halminiak
Gayle Nigolian

Lisa Berman
Sharon Brooks
Lori Buma
Joe Burns
Deborah Camp
Jim Cillo

Chris D Ablemon
Melissa Dlin
Matt Donegan
Dick Ergenbright
Greg Flock
Dante Genua
Dan Giordano
Jenine Holmes
Deena Huper
Dean Kapneck
Stu Krane
George La Banca
Tom Lang
Dennis Leonard
Marge Lewis
Bob Manown
Patti Markham
Kevin Marshall
Maureen McDonald
Brian O Keefe
Ed Ortelli
Kathy Parramore
Bob Plato
Candace Portman
Caroline Sedelmy
Meredith Walter
Cheryl Wenstrom

First Supplemental Request
Mickey Huffstetter
Kim Urbuteit
Dan Thomas
Sara Alex
Cindy Borry

Second Supplemental Request
Gregg Miller
Judi Wojciechowski

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-141

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide satellite services between the United States and Cuba

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: January 21, 1993; Released: February 1, 1993

By the Chief, Common Carrier Bureau:

1. On April 1, 1992, the Communications Satellite Corporation (Comsat), through its World Systems Division, filed an application pursuant to Section 214 of the Communications Act of 1934, as amended, for authority to provide space segment services for occasional use television channels and associated control and coordination circuits via the INTELSAT system to U.S. carriers and other authorized users on an as-needed basis for international communications between the United States and Cuba. On April 9, 1992, Comsat filed a letter clarifying that it requested limited authority to provide space segment services for occasional use television service for the following types of events:

a) for all transactions incident to the use of satellite channels for the transmission of television news and news programs originating in Cuba by United States news organizations (31 CFR §515.41(b)); and

b) for sports events originating either in the United States or Cuba for which specific licenses are issued on a case-by-case basis by the Treasury Department, acting pursuant to the Cuban Assets Control Regulations (31 CFR §515.41(c)).

The application was placed on public notice on April 8, 1992, and no oppositions were received.

2. Comsat explains that during the past four years, it has filed approximately 43 requests, including supplements and amendments, for special temporary authority (STA) to provide service to carriers transmitting news and sports events either into or out of Cuba.[1] It states that many of these requests are time sensitive and require expedited action. Comsat further states that none of its requests has ever been denied. In the instant application, therefore, Comsat requests limited blanket authority to provide these specific space segment services on an ongoing basis.

3. In support, Comsat states that the STA procedure is burdensome, and that it does not actually "go into" Cuba with any equipment or service. Comsat only provides space segment from the U.S. to an INTELSAT Atlantic Ocean Region satellite typically located at 325.5 or 335.5 degrees East Longitude (E.L.); the Cuban PTT provides space segment from the Caribe earth station or transportable earth stations in Cuba to the corresponding satellite. Moreover, Comsat maintains that it is not involved in the settlement process, and therefore makes no payments to Cuba, whether to blocked accounts or otherwise.[2] Finally, Comsat argues that it does not provide any technology or financing to Cuba.

4. We conclude that it will be in the public interest to grant Comsat authority to provide space segment service for occasional use television channels and associated control and coordination circuits via the INTELSAT system to U.S. carriers and other authorized users on an as-needed basis for international communications between the United States and Cuba for news and sports events in accordance with 31 C.F.R. §515.41(b) and §515.41(c). Grant of this application will serve the public interest, convenience and necessity by allowing Comsat to provide U.S.-Cuba occasional use television service without unnecessary delays and without repeated STA filings involving burdensome, redundant and costly paperwork.

5. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, that the application of Communications Satellite Corporation, File No. I-T-C-92-141, IS GRANTED and Comsat is authorized to provide space segment services for occasional use television channels and associated control and coordination circuits via the INTELSAT system to U.S. carriers and other authorized users on an as-needed basis for international communications between the United States and Cuba for the following types of events:

a) for all transactions incident to the use of satellite channels for the transmission of television news and news programs originating in Cuba by United States news organizations (31 CFR §515.41(b)); and

b) for sports events originating either in the United States or Cuba for which specific licenses are issued on a case-by-case basis by the Treasury Department, acting pursuant to the Cuban Assets Control Regulations (31 CFR §515.41(c)).

6. IT IS FURTHER ORDERED that Comsat, U.S. carriers and other authorized users shall comply with the Department of the Treasury's Office of Foreign Assets Control regulations.

[1] Comsat states that the transmission of news programming has blanket approval under current Cuban Assets Control Regulations. Furthermore, we have been informed by the State Department that grant of this application would not conflict with U.S. policy. *See* letter from Vicki J. Huddleston, Coordinator for Cuban Affairs, United States Department of State, to Linda Trochim, Common Carrier Bureau, dated November 24, 1992.

[2] Comsat is not the final service provider. Other carriers will provide service under previously granted authority that authorizes them to provide video service to all points served by Comsat. Thus, these other carriers will need no additional authorization to provide video services to Cuba. Such carriers remain subject to all applicable regulations of the Treasury Department pertaining to payments to Cuba.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that Comsat shall file and have in effect a tariff for the service authorized in this order before offering services to the public.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC. — File No. I-T-C-92-264

Application for authority to provide packet switching service between Hawaii, on the one hand, and Fiji and the Solomon Islands, on the other hand.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 19, 1993; Released: February 1, 1993

By the Chief, International Facilities Division

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of packet switching service between Hawaii, on the one hand, and Fiji and the Solomon Islands, on the other hand, by GTE Hawaiian Telephone Company Inc, (HTC).

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-92-264 IS GRANTED, and HTC is authorized to provide international packet switching service (IPSS), on a transit basis, via facilities provided by Sprint International Systems Services and Hong Kong Telecom, between Hawaii, on the one hand, and Fiji and the Solomon Islands, on the other hand.[1]

3. No material changes inconsistent with this or any other recent Commission order shall be made before final execution of operating agreements between HTC and its correspondents, and HTC shall file copies of the agreements as well as any amendments (including accounting rates) with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the appliant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] Connection with Sprint International Systems and Services (Sprint ISS) will be made at the GTE Hawaiian Tel packet switch in Honolulu; Sprint ISS will then carry the traffic from Hawaii to Hong Kong. From Hong Kong, service to Fiji and the Solomon Islands will be provided by Hong Kong Telecom over its existing facilities terminating in Fiji and the Solomon Islands.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-7

In the Matter of

Implementation of Section 17
of the Cable Television
Consumer Protection and
Competition Act of 1992

Compatibility Between
Cable Systems and Consumer
Electronics Equipment

NOTICE OF INQUIRY

Adopted: January 14, 1993; Released: January 29, 1993

Comments Due: March 22, 1993
Reply Comments Due: April 21, 1993

By the Commission:

INTRODUCTION

1. By this inquiry, the Commission seeks to obtain information regarding means of assuring compatibility between consumer electronics equipment and cable systems. This action is the first step towards our implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).[1] The objective of this portion of the 1992 Cable Act is to ensure that cable subscribers will be able to enjoy the full benefits and functions of their television receivers and video cassette recorders (VCRs) when receiving programming from cable systems, consistent with the need to prevent theft of cable service. The information obtained through this inquiry will form the basis for a report to Congress and subsequent rule making to develop appropriate regulations to implement the provisions of Section 17.

BACKGROUND

2. Section 17 of the 1992 Cable Act adds a new Section 624A to the Communications Act that addresses compatibility between consumer electronics equipment and cable systems.[2] In Section 624A(a), Congress makes the following findings with regard to this issue:[3]

> -Television receivers and video cassette recorders often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption and by the use of cable devices, such as converters and remote control units, needed to receive programming;
>
> -Consumers will be less likely to purchase, and electronics manufacturers will be less likely to develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions, if these problems are allowed to persist; and,
>
> -Cable operators should use technologies that will prevent signal thefts while permitting consumers to benefit from the features and functions contained in such television receivers and video cassette recorders.

3. Section 624A(b) specifies that, within one year of the enactment of the legislation, the Commission, in consultation with representatives of the cable and consumer electronics industries, must report to Congress on means of assuring compatibility between TV sets, VCRs and cable systems, consistent with the need to prevent theft of cable service.[4] This section also provides that within 180 days of that report, the Commission must issue such regulations as are necessary to ensure compatibility between consumer electronics equipment and cable systems. Section 624A(b) further states that in issuing these rules, the Commission shall consider whether and under what circumstances to permit cable systems to use scrambling, except that the Commission shall not limit the use of scrambling technology where it does not interfere with the functions of subscribers' TV receivers or VCRs.[5]

4. Section 624A(c) specifies that, in developing the rules required by Section 624A(b), the Commission is to consider:[6]

> -The costs and benefits to consumers of imposing compatibility requirements on cable operators and TV manufacturers in a manner that, while providing effective protection against theft or unauthorized reception of cable service, will minimize interference with or nullification of the special functions of subscribers' television receivers or VCRs, including functions that permit the subscriber to--

---

[1] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, (1992), §17. This proceeding is limited to issues involved in implementation of Section 17 of the 1992 Cable Act. We are addressing the implementation of other portions of this new legislation in separate proceedings.

[2] *See* Section 624A, Section 17 of the 1992 Cable Act, *supra*.

[3] *See* Section 624A(a), Section 17 of the 1992 Cable Act, *supra*.

[4] *See* Section 624A(b)(1), Section 17 of the 1992 Cable Act, *supra*.

[5] *See* Section 624A(b)(2), Section 17 of the 1992 Cable Act, *supra*.

[6] *See* Section 624A(c)(1), Section 17 of the 1992 Cable Act, *supra*.

--watch a program on one channel while simultaneously using a VCR to tape a program on another channel;

--use a VCR to tape two consecutive programs that appear on different channels; and,

--use advanced television picture generation and display features, and;

-The need for cable operators to protect the integrity of the signals transmitted by the cable operator against theft or to protect such signals against unauthorized reception.

5. Section 624A(c) further provides that the equipment compatibility regulations prescribed under Section 624A shall include:[7]

-Technical requirements with which a television receiver or VCR must comply in order to be sold as "cable compatible" or "cable ready";

-Requirements that cable operators offering channels whose reception requires a converter unit--

--notify subscribers that they may not be able to use the special features of their TV receivers and VCRs;

--to the extent technically and economically feasible, offer subscribers the option of having all other channels delivered directly to the subscribers' TV receivers or VCRs without passing through the converter unit;

-Rules to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter units and of remote control devices compatible with converter units;

-Requirements that cable operators who offer subscribers the option of renting a remote control unit--

--Notify subscribers that they may purchase a remote control from any source that sells such devices;

--Specify the types of remote control units that are compatible with the converter unit supplied by the cable operator; and,

-Prohibit a cable operator from taking any action that prevents or in any way disables converter units from operating with commercially available remote controls.

6. Finally, Section 624A(d) requires the Commission to review periodically and, if necessary, modify the regulations issued pursuant to this section in light of actions taken in response to the regulations and to changes in cable systems, television receivers, VCRs and related technology.

7. Under the Commission's current rules, cable systems are subject to technical standards that specify minimum performance with regard to the quality of NTSC (or similar format)[8] video signals provided at subscriber terminals; delivery of closed captioning information; and signal leakage limits.[9] Related rules specify requirements for monitoring and measuring technical performance and resolving any interference resulting from cable system operation.[10] The Commission's rules currently do not address compatibility between cable systems and extended features of subscribers' TV sets, VCRs and related equipment.[11]

DISCUSSION

8. Problems between cable systems and consumer television equipment generally tend to arise from conflicts between new features in consumer television equipment and the techniques used by cable systems to address security and other technical operating considerations. Many TV receivers, VCRs and related consumer television equipment on the market today include features intended to allow them to be connected directly to a cable service and to tune to channels across frequency ranges used by many cable systems. Manufacturers typically market equipment with these features as "cable compatible" or "cable ready." In addition to cable ready features, many higher-priced units of consumer television equipment also include a variety of other special features that allow users to make use of multiple program channels.[12]

9. Cable systems typically use a variety of techniques to address security and important technical considerations. As a result of cable systems' use of these techniques, the manner in which cable service is delivered to subscribers often frustrates the use of special features that make use of multiple program signals. This tends to occur most often where some or all of the cable signals are scrambled or otherwise encrypted and the cable system provides service through a cable terminal device, or "cable converter," that provides a single channel of programming to the consumer's equipment.[13] In such cases, tuning to the full range of channels is accomplished through the converter. Because there are no standards for the capabilities of cable ready equipment and because cable systems tend to vary in the frequencies they use for delivery of service, equipment designated as "cable ready" by manufacturers in many

---

[7] *See* Section 624A(c)(2), Section 17 of the 1992 Cable Act, *supra*.

[8] Some cable systems disassemble the NTSC video signal for transmission through their plant. The disassembled signal is reassembled prior to its delivery to subscribers. The reassembled signal is not in the NTSC format in all respects. However, it can be received and displayed by current TV receivers and is subject to our cable technical standards.

[9] *See* 47 C.F.R. §76, Subpart K.

[10] *Id.*

[11] Our existing rules only require that the cable television channels delivered to a subscriber's terminal be capable of being received and displayed by receivers intended for reception of off-the-air reception of broadcast TV signals, as authorized under Part 73 of our rules.

[12] For example, VCRs typically are equipped to allow a user to view one program channel while recording another channel at the same time. Many VCRs also can be programmed to record consecutive programs that appear on different channels. In addition, some television sets incorporate advanced "picture in picture" display features that allow simultaneous viewing of the video of two or more different program channels.

[13] Cable systems also use converter boxes to align channels, to cure direct pick-up interference problems from strong radio service signals and to control signal leakage.

cases is not able to tune all of the channels of a given cable system. Similarly, the converters used by cable systems often preclude proper operation of the remote control features of consumer television equipment.

10. The new Section 624A of the Communications Act requires that the Commission study these compatibility issues and develop appropriate regulations to assure compatibility between cable systems and consumer equipment, consistent with the need to prevent theft of cable service.[14] In this first phase of our implementation of Section 624A, we seek information on the nature and extent of the compatibility problem between cable systems and consumer electronics devices, including cable system operating technologies and practices and the extended features included in consumer equipment. In examining these issues, we request information regarding alternative approaches available to cable operators for protecting against unauthorized reception of their services. We also seek information and suggestions regarding possible alternative regulatory approaches for ensuring compatibility that will minimize costs for cable operators, consumer electronics manufacturers and consumers. The specific information we are requesting on each of these areas of inquiry is discussed in the sections which follow.

11. As indicated above, this information will be used in preparing our report to Congress on the means of ensuring compatibility between cable systems and consumer equipment and in formulating our proposals for regulations in this area. We also intend to consult with representatives of the cable television and consumer electronics industries and will also consult with other parties, as appropriate.[15]

12. *Cable Technologies and Operating Practices.* The first step in developing a regulatory plan for achieving compatibility between cable systems and consumer equipment is to identify the current technologies and practices used by cable systems in delivering service to subscribers. We seek information about the technologies and practices that tend to preclude operation of the extended features of consumer equipment. We similarly seek information on technologies and practices that tend to support the operation of such features. We also request data regarding the extent to which the various types of technologies and equipment currently are used by cable systems nationwide. In particular, we ask commenting parties to address these questions:

-What technologies and technical systems do cable systems currently use to provide service to subscribers' premises?

--How many channels of service are provided on a cable and what frequencies are used for delivery of those channels? In what circumstances and to what extent are dual cables used to deliver service?

--What methods and technologies do cable systems use to prevent theft and unauthorized reception of service (the various scrambling and encryption systems, converter and/or descrambler units, interfering carrier systems, channel-blocking traps, addressable systems, interdiction systems, etc.)? What are the operating principles used in each of these approaches?

--What proportion of cable systems (and the number and proportion of subscribers affected) use each of the available security methods and technologies? How many systems use converter units, for either security or other purposes, such as elimination of direct pick-up interference in receivers, and how many and what percentage of subscribers on those systems are using converters?

--What are the costs of the existing alternative techniques for preventing theft, unauthorized reception and addressing technical performance considerations, both to cable systems and subscribers?

-What is the effect of channelization practices and security systems on the operation of extended features of television receivers, videocassette recorders and other related consumer television equipment? How does use of these techniques affect the technical performance and operations of cable systems?

-Which methods of scrambling and encryption systems do not interfere with the functions of subscribers' TV receivers, VCRs and other TV equipment?

-What types of cable converters are currently available to cable subscribers commercially from third parties?

--To what extent do cable systems currently make converters and/or remote control units available for purchase by their subscribers?

---

[14] The proper resolution of the issues in this proceeding requires a recognition and balancing of the very significant costs associated with both the redundant and incapacitated consumer electronics equipment involved and with the theft of cable service. With respect to the latter issue, we note that a recent survey by the National Cable Television Associations's Office of Cable Theft suggests that service theft results in over $4.7 billion in unrealized revenue annually. National Cable Television Association, "1992 Theft of Service Survey Results" (Dec. 1992). As the rates for cable service become subject to increased regulatory oversight under the provisions of the 1992 Cable Act, such losses become increasingly an issue of concern to cable operators as well as cable system investors. The costs associated with incompatible and unusable consumer electronics equipment may also be in the billions of dollars. We request comment on this assumption.

[15] We note, for example, that a joint cable/consumer equipment industry committee has been established by the National Cable Television Association and the Electronics Industry Association to investigate means for assuring compatibility between cable systems and consumer TV equipment.

-To what extent is it technically and economically feasible for cable systems to offer subscribers the option of delivering directly to subscribers' receivers or VCRs all signals that do not need to pass through a converter?

-To what extent are cable converters or other devices used by cable systems to resolve technical problems such as signal leakage?

13. *Consumer Equipment Features.* We also need to develop a full understanding of the various features incorporated in consumer television receivers, videocassette recorders and other related equipment that can be affected by the manner in which cable service is delivered. In this regard, we request information and comment concerning the following:

-The features incorporated in consumer electronics equipment that can be affected by the manner of cable signal delivery.

--What types and portions of currently available consumer TV equipment include such features?

--How are these features affected by the various methods of cable signal delivery, particularly with respect to techniques and methods cable operators use to protect against theft of service?

--Generally, the number of cable channels that currently available "cable ready" TV receivers, VCRs and other equipment can accept tends to vary across different equipment. How many channels of cable service does currently available TV equipment accept, how does this vary across different equipment and what are the frequencies of these channels, including their associated video and aural carrier frequencies?

--Are any new consumer TV equipment features anticipated or expected in the foreseeable future that would pose compatibility issues different from those indicated in the 1992 Cable Act?

-What equipment other than TV receivers and VCRs are affected by the compatibility relationships addressed herein?

-The definition of a "cable compatible" or "cable ready" unit.

--What features should a device incorporate to be considered cable compatible or cable ready?

--How many channels should a device be able to receive, and in what frequency ranges should those channels be, in order to be considered cable ready or cable compatible? What other cable system operating characteristics should a device be able to accommodate to be considered cable compatible?

14. *Regulatory Program for Assuring Compatibility.* The above information will provide a base for understanding the nature and extent of compatibility between cable system operations and consumer television equipment. As instructed by Congress, we intend to pay careful attention to the costs and benefits to consumers of imposing compatibility regulations on cable operators and television manufacturers. In this regard, we intend to balance the limiting effects of compatibility regulations on cable operators against the benefits those regulations provide in facilitating the operation of special features on consumer equipment. We seek to formulate our regulations so that they will accomplish the intent of the law with the least effect on opportunities for improvements in both cable system and consumer electronics equipment. In addition, we are aware of cable operators' need to protect effectively against theft or otherwise unauthorized use of their services. The compatibility rules we adopt should allow cable operators to employ cost-effective means for protecting their service from theft or other unauthorized interception and use. With these considerations in mind, we need additional information in the following areas relating to development of regulations for assuring compatibility between cable systems and consumer television equipment:

-To what extent could existing cable equipment be modified to be more compatible with TV receivers, VCRs and other consumer TV equipment (and how much would it cost and how long would it take to make the necessary changes), while still providing for adequate protection against theft of service?

-What new methods for providing cable system security are being developed, when will they be available and how much would they cost (to both consumers and cable subscribers)?

-How will new digital transmission techniques affect system security, including costs?

-What technical standards are necessary to assure that cable systems provide service in a manner that is technically compatible with the extended features of consumer TV equipment?

--What elements of cable system operation should be regulated to assure compatibility?

--What are the least costly approaches for a regulatory program that will achieve this goal while still permitting cable operators to prevent theft of service?

-To what extent, if any, should cable systems be restricted in the manner in which they encrypt or scramble their signals?

-What standards and/or operating requirements, if any, would be practical to accommodate the introduction of new technologies, such as compressed digital modulation, and still ensure that such technologies are compatible (insofar as possible) with TV receiver and VCR functions and features? In this regard, how should we reconcile the requirements of the Act with the introduction of new technologies and what particular difficulties do we face in attempting such a reconciliation?

-What modifications could be made to existing consumer TV equipment designs to make it more compatible with the manner in which cable service is provided?

--Should shielding requirements be required for cable ready consumer equipment to protect against interference to cable (signals from "direct pick-up" of broadcast signals and to limit unintentional radiation of cable signals by such equipment?

-What elements of consumer TV electronics equipment could be standardized to ensure compatibility with cable systems?

--Should consumer electronics equipment be required to be equipped with two cable input ports to accommodate dual cable systems? (Such capability would facilitate switching between cable within the consumer device, and through its remote control, and obviate the need for a separate and external input selector switch.)

-What standards should be specified as technical requirements with which TV receivers, VCRs and other consumer equipment must comply in order to be sold as cable compatible or cable ready?[16] For example, should we adopt rules regulating:

--The number of cable channels that can be received and the frequencies of those channels?

--A universal connection to enable the use of separate devices that can descramble signals encoded using alternative security techniques?

-To what extent could regulations intended to assure compatibility between cable systems and consumer television equipment also affect technical aspects of the "buy-through" provisions of Section 3 of the 1992 Cable Act?[17]

15. *Remote Control Units.* We also seek information to assist us in implementing regulations regarding remote control units. Many converter units used by cable systems provide for remote control of cable services. Cable systems typically charge a separate monthly fee for the remote control feature. The technologies used by some cable systems also permit the remote control features on their converter units to be remotely activated/deactivated by the cable operator. As indicated above, the 1992 Cable Act is much more specific about the nature of the rules to be applied to address remote control issue than it is for compatibility in other features. In this case, the legislation directs the Commission to adopt rules to: 1) promote the commercial availability of converter units and remote controls; 2) require cable systems to notify subscribers regarding commercial availability of remote controls; and, 3) prohibit actions that would prevent remote controls from operating with converter units. We therefore ask that parties submitting information and suggestions for rules regarding regulation of remote control units do so in the context of the regulatory requirements specified in Sections 624A(c)(2)(C) and (D).

16. In order to assist us in developing proposals for rules to implement the remote control provisions of Section 324A, we request information on the following topics:

-What types of remote control equipment currently are used by cable systems?

--To what extent is the same model of converter units provided to subscribers for both manual and remote control use?

--To what extent do cable operators use technical systems that allow them to disable a converter's remote control function, either through a manually invoked control on the device itself, or through an electronic signal that can be transmitted to the device from the cable headend?

--What portion of the market currently rents each type of cable remote control unit?

-To what extent are remote control units that are compatible with the converter units used by cable systems available to consumers now?

--To what extent are the remote control features of cable converters compatible with existing commercially available remote control units, including the "universal" remote control design?

--What types of such units are available and how much do they cost?

--What portion of the market currently owns such units?

-How can the Commission best encourage the commercial availability of remote control units that are compatible with existing converter units?

---

[16] In this regard, we note that the Senate and House conferees, in drafting the 1992 Cable Act, encouraged the development of *voluntary* efforts by the cable industry and the manufacturers of television equipment to meet the technical requirements the Commission will adopt. *See* Conference Report on the Cable Television Consumer Protection and Competition Act of 1992, H.R. Report 102-862, p. 89.

[17] Section 3 of the 1992 Cable Act, which amends Section 623 of the Communications Act, generally prohibits cable operators from requiring subscribers to purchase any "tier" of service, other than the basic service tier, "as a condition of access to video programming offered on a per channel or per program basis." This is commonly referred to as the buy-through prohibition.47 U.S.C. §543(b)(8)(A). Section 3 also provides that for a period of 10 years, or until a cable system is modified to eliminate technological impediments to unbundling of pay from other tiers of service, the prohibition shall not apply to a cable system "that by reason of the lack of addressable converter boxes or other technical limitations, do not permit the operator to offer programming on a per channel or per program basis." 47 U.S.C. §543(b)(8)(A). The Commission has issued a separate *Notice of Proposed Rule Making* addressing regulations pertaining to the buy-through prohibition in a separate proceeding. *See Notice of Proposed Rule Making* in MM Docket No. 92-262, adopted December 10, 1992, FCC 92-540, released December 11, 1992.

17. *Future Cable Television and Consumer Electronics Developments.* The foregoing discussion focuses primarily on the current status of cable television and consumer electronics technology in the consumer marketplace. Information on the current situation is critical in determining how to respond to the problems identified in the 1992 Cable Act. We also seek information on likely future developments in cable television distribution techniques and consumer electronics that may be used in association of cable television reception:

-How will projected increases in cable television channel capacity affect the interface?[18] What is the likelihood that any interface would either become obsolete in a short time or inadvertently stifle technological advances?

-Will digital transmissions, including advanced television and video compression change the nature of the interface in ways that should be addressed in this proceeding?

--How would the use of such methods affect the operation of special features of cable subscribers' TV equipment?

-What are the implications for a standard interface arising from the digital transmission of video over common carrier networks?

-How might prospects for new remote control devices providing access to program types rather than channel numbers, affect, or be affected by, this proceeding?[19]

-How will expanded receiver features, such as increased "picture-in-picture" features, be accommodated?[20] In this regard, we seek assistance in developing rules that provide the least possible obstacle to technical improvements in both cable television and consumer electronics consistent with accomplishing the stated objectives of the law.

18. *Implementation Considerations/Schedule.* One of the most important elements in implementing the new equipment compatibility regulations will be the schedule by which they become effective. The extent to which the implementation of our equipment compatibility rules are spread over time will significantly affect the impact of these rules on cable operators and equipment manufacturers. At the same time, we must balance the interests in minimizing the impact of this regulation on industry with the need to promote compatibility in a prompt manner. It would appear that the scheduling of some requirements, such as notification requirements, would have little impact on industry, so that those requirements could be implemented quickly. We request comment and information on the scheduling of the dates when cable systems and consumer equipment manufacturers should be required to comply with the new rules we will adopt. We note that Section 624A and the legislative history do not address the issue of the schedule for compliance with the new rules. We seek comment on the schedule for implementing all aspects of new rules in this area.

PROCEDURAL MATTERS

19. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before March 22, 1993, and reply comments on or before April 21, 1993. All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comment and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

20. For further information concerning this Notice of Inquiry, contact Bruce Franca or Alan Stillwell (202-632-7060), Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[18] *See e.g., Broadcasting,* December 14, 1992, p. 66 ("[fiber architecture] ... Coupled with compression, which the company anticipates will directly reach subscriber homes by the first quarter of 1994, Time Warner is preparing for systems with 500 to 600 channels."); New York *Times,* December 3, 1992, p. 1 ("The nation's biggest cable television company announced yesterday that as early as 1994, it would install technology that would ultimately let its customers receive as many as 500 channels.")

[19] *See, e.g.,* "Discovery plans compression control," *Variety,* December 14, 1992, p. 22.

[20] *See e.g., Communications Daily,* December 17, 1992, p. 3 (Thompson Consumer Electronics receiver "has all picture tricks we've ever seen displayed on widescreen sets -- and more: 2-tuner picture-outside-picture (POP); PIP with swap, freeze, expand; channel guide, with as many as 15 pictures on screen; ....").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-366

In the Matter of:

Amendment of Section 73.202(b),	RM-6230
Table of Allotments,	RM-6531
FM Broadcast Stations.	
(Jupiter and White City, Florida)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 11, 1993; Released: February 1, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by J.J. Taylor Companies, Inc. ("Taylor"), licensee of Station WEAT-FM, West Palm Beach, Florida, and a Petition for Reconsideration filed by Edens Broadcasting, Inc. ("Edens"), former licensee of Station WRBQ-FM, Tampa, Florida, both directed to the *Report and Order* in this proceeding, 4 FCC Rcd 5295 (1989). Chapman S. Root Revocable Trust filed an Opposition to the Edens Petition for Reconsideration, and Guy Gannett Publishing Company filed an Opposition to the Taylor Petition for Reconsideration. Taylor and Edens each filed a Reply. Edens also filed a Supplement to its Petition for Reconsideration.[1] The *Report and Order* allotted Channel 288A to Jupiter and Channel 284A to White City. For the reasons discussed below, we are dismissing both Petitions for Reconsideration.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Dennis L. Johnson proposing the allotment of Channel 288A to Jupiter, Florida, as a second local transmission service. In response to the *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 4695 (1988), Treasure Coast Media, Inc. filed a counterproposal proposing the allotment of Channel 288A to White City, Florida, as a first local transmission service. Consistent with our normal practice, we undertook our own engineering analysis of these conflicting proposals to determine whether an alternate channel could be allotted. As a result of that analysis, we allotted Channel 288A to Jupiter, and alternate Channel 284A to White City. Channel 284A was allotted to White City with a site restriction of 8.6 kilometers (4.2 miles) north to avoid a short-spacing to Station WEAT-FM, Channel 282C, West Palm Beach, Florida.

Taylor Petition for Reconsideration

3. As stated earlier, Taylor is the licensee of Station WEAT-FM, West Palm Beach. In a separate proceeding in MM Docket No. 87-438, we substituted Channel 282C for Channel 282C1 at West Palm Beach, and modified the Station WEAT-FM license to specify operation on Channel 282C. *See West Palm Beach, Florida*, 3 FCC Rcd 5810 (1988), *recon. denied*, 6 FCC Rcd 6975 (1991). The *Report and Order* imposed a site restriction on Channel 282C of 26.5 kilometers (16.5 miles) southwest. In its Petition for Reconsideration in this proceeding, Taylor requests that the reference coordinates for the Channel 284A allotment at White City be modified in order to permit Station WEAT-FM to implement its upgrade at its existing licensed site.

4. We are dismissing the Taylor Petition for Reconsideration. At the time of the *Report and Order* allotting Channel 284A to White City, Section 73.207 of the Rules required a separation of 105 kilometers (65.2 miles) between second adjacent Class A and Class C FM allotments. In regard to the Channel 284A allotment at White City, the reference coordinates are 95.5 kilometers (59.3 miles) from the licensed site of Station WEAT-FM in West Palm Beach. However, in the *Second Report and Order* in MM Docket 88-375, 4 FCC Rcd 6375 (1989), the Commission reduced the required minimum spacing between second adjacent Class A and Class C FM allotments from 105 to 95 kilometers (59 miles). As a consequence of that action, the Channel 284A allotment at White City is no longer an impediment to the implementation of the Station WEAT-FM upgrade at its licensed site, and Taylor does not require any relief in this proceeding.[2]

Edens Petition for Reconsideration

5. At the time of the filing of the Petition for Reconsideration, Edens was the licensee of Station WRBQ-FM, Tampa, Florida. In its Petition for Reconsideration, Edens refers to the fact that the Channel 284A allotment at White City is short-spaced to its then pending application (File No. BPH-830714AT) to maintain full Class C status for Station WRBQ-FM. In this regard, Edens argues that the *Notice* in this proceeding did not give it either "actual or constructive" notice that we might allot alternate Channel 284A to White City. As such, Edens argues that the action allotting Channel 284A to White City should be vacated in order to afford protection to its pending application.

6. We are also dismissing the Edens Petition for Reconsideration. On June 17, 1992, the District of Columbia Court of Appeals affirmed the Commission action dismissing the Edens application to maintain full Class C status. *Edens Broadcasting, Inc. v. Federal Communications Commission*, Case No. 91-1387 (D.C. Cir. June 17, 1992). As a result of this action, there is no impediment to a Channel 284A allotment at White City, Florida.

7. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by J.J. Taylor Companies, Inc., IS DISMISSED.

[1] Taylor also filed a Motion for Stay of Effective Date and of the Start of the Window Period for Filing Applications. In view of our action dismissing the underlying Petition for Reconsideration, we are dismissing this Motion as moot.

[2] On December 30, 1991, we granted the Taylor application (File No. BPH-890802ID) specifying full Class C facilities for Station WEAT-FM.

8. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed By Edens Broadcasting, Inc., IS DISMISSED.

9. IT IS FURTHER ORDERED, That the Motion for Stay of Effective Date and of the Start of the Window Period for Filing Applications filed by J.J. Taylor Companies, Inc. IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-232

In the Matter of

Amendment of Section 73.202(b), RM-8077
Table of Allotments,
FM Broadcast Stations.
(Monticello, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 8, 1993; Released: February 1, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 6809 (1992), issued in response to a petition for rule making filed by Mayflower Broadcasting Corporation ("petitioner"),[1] licensee of Station WJPH(FM), Channel 270A, Monticello, Florida, proposing the substitution of Channel 270C3 for Channel 270A and the modification of its license to specify the higher class channel. Petitioner filed comments restating its interest in the channel.[2] No other comments were received.

2. We believe the public interest would be served by substituting Channel 270C3 for Channel 270A at Monticello, since it would provide the community with a wide coverage area service. Channel 270C3 can be allotted to Monticello in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.0 kilometers (11.2 miles) south at petitioners desired site.[3] In accordance with Section 1.420(g) of the Commissions Rules, we are modifying the license for Station WJPH(FM) to specify operation on Channel 270C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Monticello, Florida	270C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WJPH(FM), Monticello, Florida, IS MODIFIED, to specify operation on Channel 270C3 in lieu of Channel 270A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Webster Broadcasting Corporation, licensee of Station WJPH(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The name and address for Mayflower Broadcasting Corporation has been changed to Webster Broadcasting Corporation, located at 3046 E. Nature Dr. Boise, ID 83706.
[2] In response to the *Notice*, petitioner provided an affidavit verifying the statements in its petition for rule making.
[3] The coordinates for Channel 270C3 at Monticello are North Latitude 30-22-56 and West Longitude 83-53-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-49

In the Matter of

Amendment of Section 73.202(b),	RM-7924
Table of Allotments,	RM-8009
FM Broadcast Stations.	
(Greenfield, Halfway and Seligman, Missouri, and Huntsville, Arkansas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 8, 1993; Released: February 1, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 7 FCC Rcd 1947 (1992), issued in response to a petition filed by KJEM-FM, A Limited Partnership ("petitioner"), requesting substitution of Channel 227C1 for Channel 227C2 at Seligman, Missouri, and the modification of its license for Station KESE to specify operation on Channel 227C1. To accommodate the upgrade at Seligman, an *Order to Show Cause* was issued to KXBR, Inc. ("KXBR"), the licensee of Station KXBR, Greenfield, Missouri, to change its channel from 228A to Channel 299A, and to Demaree Media, Inc. ("Demaree"), the licensee of Station KFAY-FM, Huntsville, Arkansas, to change its channel from 225A to Channel 258A.[2] Petitioner filed comments reaffirming its interest in Channel 227C1 at Seligman.[3] KYOO Broadcasting, Inc. ("KYOO Broadcasting"), filed a counterproposal.[4] Petitioner, KYOO Broadcasting and Ozark Mountain Broadcasting, Inc. ("Ozark"), filed reply comments. Informal comments were filed by Julian P. Freret. After the close of the comment period, petitioner and KYOO Broadcasting filed a joint request for approval of a settlement agreement.[5]

2. As indicated in the *Notice*, Channel 227C1 can be allotted to Seligman provided Channel 299A is substituted for Channel 228A at Greenfield, Missouri, and Channel 258A is substituted for Channel 225A at Huntsville, Arkansas. The proposed substitutions at Greenfield and Huntsville can be made at the current licensed sites for Stations KCBR and KFAY-FM.

3. KYOO Broadcasting, permittee of Station KYOO-FM, Halfway, Missouri, counterproposed the substitution of Channel 226C3 for Channel 226A and modification of the construction permit for Station KYOO-FM to specify operation on Channel 226C3. To accommodate the upgrade at Halfway, KYOO Broadcasting also requested the substitution of Channel 299A for Channel 228A at Greenfield, Missouri, and substitution of Channel 228A for Channel 225A at Ozark, Missouri. KYOO Broadcasting stated it would reimburse Station KXBR, Greenfield, and Station KZPF, Ozark, for their reasonable expenses incurred in changing channels.

4. On November 18, 1992, petitioner and KYOO Broadcasting filed a joint settlement agreement looking toward the resolution of this proceeding. Pursuant to that agreement, KYOO Broadcasting is withdrawing its counterproposal to substitute Channel 226C3 for Channel 226A at Halfway, Missouri. In accordance with Section 1.420(j) of the Commission's Rules, KYOO Broadcasting states that it will not receive compensation in excess of its legitimate and prudent expenses in exchange for the withdrawal and submits a statement of expenses incurred in filing the Halfway counterproposal. The withdrawal of KYOO Broadcasting's counterproposal removes the conflict between Seligman and Halfway. In view of the withdrawal of the Halfway counterproposal, no further analysis of the comments is necessary.

5. Based on the above information, we believe the public interest would be served by substitution of Channel 227C1 for Channel 227C2 at Seligman, Missouri. A staff engineering analysis has determined that Channel 227C1 can be allotted to Seligman, Missouri, at petitioner's specified site.[6] To accommodate the upgrade at Seligman, we shall substitute Channel 299A for Channel 228A at Greenfield, Missouri, and modify the license for Station KXBR to specify operation on Channel 299A.[7] We shall also substitute Channel 258A for Channel 225A at Huntsville, Arkansas, and modify the license for Station KFAY-FM accordingly.[8] In accordance with Section 1.420(g) of the Commission's Rules, we have authorized a modification of the license for Station KESE, Seligman, Missouri.

6. KXBR, Inc., licensee of Station KXBR, Greenfield, Missouri, and Demaree Media, Inc., licensee of Station KFAY-FM, Huntsville, Arkansas, did not respond to the *Order to Show Cause* as to why their respective licenses should not be modified to specify operation on Channel 299A and Channel 258A. Accordingly, pursuant to Section 1.87 of the Commission's Rules, KXBR, Inc., and Demaree Media, Inc., are deemed to have consented to the proposed modification.

---

[1] The community of Halfway, Missouri, has been added to the caption. The *Notice* incorrectly listed Huntsville, Missouri, instead of Huntsville, Arkansas.

[2] An assignment of license for Station KFAY-FM, Huntsville, Arkansas, was granted on June 9, 1992, and consummated on July 23, 1992. Henden-McChristian Communications is the new licensee.

[3] In response to the *Notice*, petitioner provided an affidavit verifying the statements in its petition for rule making.

[4] Public Notice of the counterproposal was given on June 8, 1992, Report No. 1894 (RM-8009).

[5] Because this agreement resolves conflicting issues in this case, we believe acceptance is in the public interest. *See* Commission Rule 1.415(d).

[6] The coordinates for Channel 227C1 at Seligman are 36-28-03 and 94-10-25.

[7] The coordinates for Channel 299A at Greenfield are 37-23-10 and 93-53-16.

[8] The coordinates for Channel 258A at Huntsville are 36-05-35 and 93-36-16.

7. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its intention to reimburse KXBR, Inc. and Demaree Media for all reasonable expenses incurred in changing their frequency to the new channel.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Greenfield, Missouri	299A
Huntsville, Arkansas	258A
Seligman, Missouri	227C1

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KESE, Seligman, Missouri, IS MODIFIED to specify operation on Channel 227C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station KXBR, Greenfield, Missouri, and the license of Station KFAY-FM, Huntsville, Arkansas, ARE MODIFIED, to specify operation on Channel 299A and Channel 258A respectively, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Licenses BLH-910903KB (Huntsville Arkansas) and BLH-6184 (Greenfield, Missouri) except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Licenses BLH-910903KB (Huntsville, Arkansas) and BLH-6184 (Greenfield, Missouri), except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Henden-McChristian Communications
Station KXBR
Rt. 5, Hwy 72 East
Gravette, Arkansas 72736

KXBR, Inc.
19 East 200 South
Salt Lake City, Utah 84111

Demaree Media, Inc.
Station KFAY-FM
P.O. Box 878
Fayetteville, Arkansas 72712

William J. Pennington, III
Post Office Box 4203
Wilmington, North Carolina 28406
(Counsel for KYOO Broadcasting)

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KJEM FM, A Limited Partnership, licensee of Station KESE, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

13. IT IS FURTHER ORDERED, That the Request for Dismissal of Counterproposal filed by KYOO Broadcasting IS GRANTED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-522

In the Matter of

Amendment of Section 73.202(b),	RM-7493
Table of Allotments,	RM-7499
FM Broadcast Stations.	
(Douglas, Georgia and	
LaCrosse, Florida)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 6, 1993; Released: February 1, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6575 (1990), issued in response to two separate and mutually exclusive petitions for rule making. WDMG Inc. ("WDMG"), licensee of Station WDMG(FM), Channel 258C1, Douglas, Georgia, requested the substitution of Channel 258C for Channel 258C1 at Douglas, and the modification of its license to specify Channel 258C (RM-7493). Robert E. Wideman ("Wideman") requested the allotment of Channel 258A to LaCrosse, Florida, as that community's first local FM transmission service (RM-7499). Wideman filed a petition for acceptance of late comments. WDMG filed supporting comments and a supplement to its comments. Wideman filed reply comments.[1]

2. WDMG contends that the two proposals are not mutually exclusive, suggesting that both proposals can be allotted with the imposition of site restrictions different from those in the *Notice*.[2] Therefore, WDMG claims that it is possible to improve existing service to Douglas, Georgia, and offer first local transmission service to the community of LaCrosse, Florida.

3. We believe the public interest would be served by substituting Channel 258C for Channel 258C1 at Douglas, Georgia, since it could provide an enhanced service to that community, and by allotting Channel 258A to LaCrosse, Florida, as that community's first local transmission service. Channel 258C can be allotted to Douglas in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at city reference coordinates.[3] Channel 258A can be allotted to LaCrosse in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.2 miles) southeast,[4] in order to avoid a short-spacing to Station WQIK(FM), Channel 256C, Jacksonville, Florida. Therefore, in accordance with Section 1.420(g) of the Commission's Rules, we are modifying the license of Station WDMG(FM) to specify operation on Channel 258C at Douglas, Georgia.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
LaCrosse, Florida	258A
Douglas, Georgia	258C

5. The window period for filing applications for Channel 258A at LaCrosse, Florida, will open on **March 19, 1993**, and close on **April 19, 1993**.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WDMG Inc., for Station WDMG(FM), Douglas, Georgia, IS MODIFIED, to specify operation on Channel 258C in lieu of Channel 258C1, subject to the following conditions:

---

[1] Wideman's comments, which express a continuing interest in the LaCrosse allotment, were late-filed and accompanied by a request for their acceptance. Ordinarily in contested proceedings, late filed expressions of interest are not acceptable. In this instance, however, acceptance would cause no prejudice to any other parties, since WDMG has found a site for the Douglas channel that removes the conflict between the proposals, thereby allowing us to accommodate both parties. Therefore, we shall accept the late filed expression of interest.

[2] WDMG proposes to allot Channel 258C to Douglas, Georgia, at coordinates 31-39-14 and 83-08-32 and to allot Channel 258A to LaCrosse, Florida, at coordinates 29-44-38 and 82-19-52.

WDMG notes that the reference point proposed herein for Channel 258C at Douglas, Georgia, would be short-spaced to the reference point for Channel 257C2 at Lumpkin, Georgia. However, the reference point proposed herein would not be short-spaced to the transmitter sites proposed in any of the Lumpkin, Georgia, applications. Radio Lumpkin, Inc. holds a construction permit (BPH-891214MI) for Channel 257C2, Lumpkin, Georgia, which does not conflict with the allotment of Channel 258C at Douglas, Georgia. Therefore, WDMG's comments in reference to Lumpkin, Georgia, are now moot.

In addition, WDMG states that the Douglas channel allotment would require the imposition of a site restriction on a pending rule making proceeding proposing to substitute Channel 260A for Channel 278A at Unadilla, Georgia. *See* MM Docket No. 91-336, 6 FCC Rcd 6646 (1991). However, a staff engineering analysis has determined that Channel 258C can be allotted to Douglas, Georgia, at city reference coordinates (31-30-36 and 82-50-54) instead of the coordinates proposed herein, thereby eliminating the conflict with Channel 260A, Unadilla, Georgia.

[3] The coordinates for Channel 258C at Douglas are North Latitude 31-30-36 and West Longitude 82-50-54.

[4] The coordinates for Channel 258A at LaCrosse are North Latitude 29-44-38 and West Longitude 82-19-52.

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, WDMG Inc., licensee of Station WDMG(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-5

In the Matter of

Elimination or Revision of Certain Reporting Requirements under Part 43 of the Commission's Rules, Reports of Communication Common Carriers and Certain Affiliates.

NOTICE OF PROPOSED RULEMAKING

Adopted: January 11, 1993; Released: February 2, 1993

Comment Date: March 22, 1993
Reply Comment Date: April 6, 1993

By the Commission:

I. INTRODUCTION

1. We initiate this proceeding to eliminate certain reporting requirements under Part 43 of our Rules, Reports of Communications Common Carriers and Certain Affiliates. This item is part of the Commission's Regulatory Reform Program to evaluate existing regulations and to accelerate action on initiatives that will eliminate any unnecessary regulatory burden and promote economic growth. We propose to eliminate Section 43.42, Reports on pensions and benefits, 47 C.F.R. §43.42. We also propose to amend Section 43.21(c), 47 C.F.R. §43.21(c), by raising the reporting limit for companies which control common carriers and which are required under Section 43.21(c) to file Annual Report Form 10-K (Form 10-K) with the Commission.[1]

II. DISCUSSION

2. In recent months we have undertaken a review of our reporting requirements to determine those reports which are no longer necessary or which should be modified to meet our current regulatory needs. Through this process we have found certain reporting provisions under Part 43 that we believe require communications common carriers or owners of communications common carriers to submit data and documents which we no longer need. These requirements were originally established to provide us with information relevant to our regulatory purposes, but the information that they contain is no longer needed on a routine basis or can now be obtained from other sources. We have tentatively concluded that these requirements can be eliminated or modified without harm to the public. Implementation of the changes we propose will result in savings to the public by reducing industry reporting burdens and to the Commission by reducing the cost of processing the filings and maintaining them in storage. The subject areas in Part 43 are discussed below.

A. Elimination of Pension and Benefits Data Filing

3. Section 43.42 of our Rules requires communications common carriers with annual revenues of $100 million or more to file with this Commission copies, or detailed descriptions, of their pension and benefits plans, along with other documents and details related to such plans. We propose to eliminate these requirements by deleting Section 43.42 from our Rules.

4. Pension and benefit costs have been an important matter for the telephone industry and regulators because these expenses have long represented a significant portion of the carriers' operating expenses. For example, in 1991 these expenses accounted for almost 9 percent of the total operating expenses ($4.5 billion of $50.9 billion) for the seven Regional Bell Operating Companies.[2] These pension and benefit costs have been among the most closely scrutinized by regulators because, by their very nature, they must be based upon long-term forecasts of various parameters that are difficult to estimate, and which rely on estimates and actuarial assumptions.[3] Because of the importance of pension and benefit costs, filing requirements were established to permit the Commission to monitor and evaluate carriers' cost estimates, funding practices, and the soundness of the plans. In recent years there have been substantial changes in the laws for the oversight of pension plans and in the generally accepted accounting principles applicable to the accounting for pension plans, yet our filing requirements have remained substantially unchanged for more than 20 years.[4]

5. In 1974, Congress passed the Employee Retirement Income Securities Act (ERISA) which established standards of conduct for pension and welfare benefits plans and had a substantial impact on the funding and administration of such plans. ERISA is now the principal legislation governing private pension funds. The ERISA rules require that

---

[1] Form 10-K is a Security and Exchange Commission report containing annual financial statements and other financial data and is required to be filed by certain companies whose stock is publicly traded.

[2] Source: Preliminary Statistics of Communications Common Carriers for the year ending December 31, 1991, released by the Commission September 10, 1992.

[3] Various assumptions and forecasts need to be made when estimating pension and benefits cost. Examples include interest rates to be used for actuarial earnings, rate assumptions, mortality, withdrawal, disability and retirement rates.

[4] The only exception was in 1988 when the Commission amended Section 43.42 to reduce the number of communications common carriers who must file pension reports with us. Section 43.42(a) of our rules previously required carriers with operating revenues in excess of $1 million for the preceding year to file specified reports on their employee pension and benefits plans. We amended Section 43.42(a) by requiring the filing of these reports only by carriers which we determined to be "dominant" carriers and which had operating revenues for the preceding year in excess of $100 million. We made no change in the contents of the reports to be filed. *See Report and Order*, CC Docket No. 87-134, 3 FCC Rcd 6908 (1988).

plan assets be held in trust under stringent fiduciary standards. The rules also provide standards for transactions between pension plan funds and employers.

6. ERISA requirements are enforced jointly by the Internal Revenue Service (IRS) and the Department of Labor (DOL) which have specific reporting and disclosure requirements that apply to private pension plans. IRS annual reporting requirements provide for the filing of plan descriptions, plan financial statements, insurance and actuarial information, and plan asset summaries. The DOL requires companies to submit summary plan descriptions including statements of rights under their plans. Additionally, ERISA rules include requirements for audits by DOL and independent public accounting firms and provisions that plan participants receive summary descriptions of their plan and annual summaries of plan financial statements.

7. ERISA established the Pension Benefit Guarantee Corporation (PBGC) to guarantee payment in the event that a defined benefit plan is terminated because funds are not sufficient to pay the benefits that are or will be due. PBGC receives quarterly and annual reports from the pension funds covered by the guarantee.

8. In addition to the changes brought about by ERISA, the Financial Accounting Standards Board (FASB) has issued three Statements of Financial Accounting Standards (SFAS) to provide guidance for accounting for pension and benefits costs.[5] The changes that have resulted from the ERISA requirements and the generally accepted accounting principles issued by the FASB have brought about a greater degree of uniformity in the process of estimating and accounting for pension and benefits costs. With the greater uniformity and increased oversight provided by other agencies there is a reduced need for our collection of pension and benefit data. For example, since the pension expenses included in reports to this Commission are now determined on a more consistent basis there is no need to require carriers to file the underlying details of their pension and benefits plans. We can accomplish our necessary oversight with the pension data currently being reported in the Automated Reporting Management Information System USOA Report 43-02, Table VIII, Pension Cost, and, as necessary, with specific data requests to the carriers.

9. We request comment on our proposal to eliminate Section 43.42 of our Rules requiring common carriers to file pension and benefits documents and data.

B. Amendment of Section 43.21(c) Requirement for Filing Annual Report Form 10-K

10. Section 43.21(c) requires any company, not itself a communications common carrier, that directly or indirectly controls any communications common carrier having annual revenues in excess of $2.5 million to file annually with the Commission complete copies of any Forms 10-K filed with the Securities and Exchange Commission. We propose to amend this requirement by increasing the specified revenue level from $2.5 million to $100 million.

11. The current requirement to receive Forms 10-K from companies that control common carriers is not consistent with our regulatory needs. This Commission does not routinely require financial reporting from communications common carriers with annual operating revenues less than $100 million. We have tentatively concluded, therefore, that there is no need to receive financial reports from a controlling company when the controlled communications common carrier does not have annual operating revenues in excess of $100 million. This proposed change, if adopted, would, therefore, make the Section 43.21(c) requirement consistent with other Part 43 reporting requirements for communications common carriers.

12. We request comments on our proposal to amend Section 43.21(c) by increasing the specified revenue limit for reporting so that its provisions will apply to only those companies that directly or indirectly control communications common carriers with revenues in excess of $100 million annually. We also invite comment on whether an alternative threshold, other than $100 million, should be adopted as the specified revenue limit for filing the Forms 10-K with this Commission.

III. PROCEDURAL MATTERS

13. *Ex Parte Rules - Non - Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1,1203, and 1, 1206(a).

14. *Regulatory Flexibility.* We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate services affected by the proposed rule amendment generally are large corporations or affiliates of such corporations. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

15. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **March 22, 1993** and reply comments on or before **April 6, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copes. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Washington, D.D. 20554.

[5] The FASB is the authoritative standard setting body for accounting practices that are used in the American business community. The FASB issued SFAS No. 87, Employers' Accounting for Pensions, in 1985; SFAS No. 88, Employers' Accounting for Settlements and Curtailments of Defined Benefit Pension Plans and for Termination Benefits, in 1985; and SFAS No. 106, Employers' Accounting for Postretirement Benefits Other Than Pensions, in 1990.

16. For further information on this proceeding, contact the Accounting Systems Branch, Room 812, 2000 L Street, N.W., Accounting and Audits Division, F.C.C., Washington, D.C. 20554, (202) 634-1861.

IV. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED that, pursuant to Sections 4, 218, 219, 220 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 218, 219, 220, and 303, NOTICE IS HEREBY GIVEN of proposed amendments to Parts 43.21 (c) and 43.42 of the Commission's Rules, 47 C.F.R. §43.21 (c) and §43.42 as described in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 CFR, Part 43 is amended as follows: Part 43 - Reports of communication common carriers and certain affiliates

1. The authority citation for Part 43 continues to read as follows:

Authority: Sec 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted.

1. Paragraph (c) of Section 43.21 is revised to read as follows:

43.21 Annual reports of carriers and certain affiliates.

*****

(c) Each company, not of itself a communication common carrier, that directly or indirectly controls any communication common carrier having annual revenues in excess of $100 million shall file annually with the Commission, not later than the date prescribed by the Securities and Exchange Commission for its purposes, two complete copies of any annual report Forms 10-K (or any superseding form) filed with that Commission.

*****

2. Section 43.42 is removed.

*****

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

Southwestern Bell Telephone Company
Petition for Waiver
of Certain Reporting Requirements

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 1993; Released: January 28, 1993

By the Chief, Accounting and Audits Division:

1. On May 17, 1991, the Bureau released its Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established filing dates for each of the reports required from price cap LECs. One of these reports, the Quarterly Service Quality Report (ARMIS Report 43-05) for the third quarter of 1992, was due December 31, 1992. On January 11, 1993, Southwestern Bell Telephone Company (Southwestern Bell) filed an *ex post facto* petition for waiver of certain ARMIS Report 43-05 filing requirements. In this Order we grant that petition.

2. Table I of Report 43-05 includes interexchange access service installation and repair data. Southwestern Bell seeks permission to supplement data in rows 110-113, Column A (number of orders, percent commitments met, and average missed commitments) for two study areas for two months of the quarter. Southwestern Bell states that some discrepancies have been noted, and that their full effect was not fully investigated and resolved prior to the filing date due to the absence of key personnel during the holiday season. Southwestern Bell proposes to file corrected data no later than February 1, 1993. Southwestern Bell also states that it is unable to provide correct data in rows 120 and 121 (total trouble reports and average repair interval) for one study area for this quarter. While it cannot provide corrected data for these rows for this study area, Southwestern Bell notes that it does provide a total-company average for these rows.

3. While we condone neither Southwestern Bell's actions in this regard nor its belated filing of a waiver petition, we do find that Southwestern Bell has narrowly defined its waiver request, and has proposed prompt correction where possible, and an acceptable alternative filing where no correction is possible. We are thus able to find good cause why this petition should be granted.

4. Accordingly, IT IS ORDERED that the request for waiver filed by Southwestern Bell Telephone Company in the above-captioned proceeding on January 11, 1993, IS GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

---

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com.Car.Bur. 1991) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

PacTel Cellular File No. 216MS0031

Notice of Apparent Liability for
Forfeiture Penalty for Station KNKA236
in the Domestic Public Cellular Radio
Telecommunications Service serving
Market 18B, San Diego, California

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 15, 1993; Released: February 2, 1993

By the Commission:

1. On February 6, 1991, the Mobile Services Division (MSD), pursuant to Subpart F of Part 22 of the Commission's Rules, Sections 22.400, *et seq.*, granted developmental authorization to PacTel Cellular (PacTel) to conduct field tests using experimental radio equipment operating on cellular frequency Block B. The authorization was for a period of one year, expiring on February 6, 1992. PacTel's developmental authorization required PacTel to file a report with the Commission containing the information required by Section 22.406(a) of the Commission's Rules at the close of the developmental period. PacTel, however, did not file the required information at the expiration of its developmental authorization.[1]

2. On July 20, 1992, PacTel submitted a request for Special Temporary Authority (STA) to continue tests which were initiated under the previously granted and expired developmental authorization. In its STA request, PacTel indicated that notwithstanding the February 6, 1992 expiration of its developmental authorization, it had continued testing. On July 21, 1992, PacTel filed an application for developmental authority to continue testing. On July 27, 1992, the MSD granted PacTel developmental authorization through July 27, 1993.

3. The following day, July 28, 1992, the MSD set aside its July 27th action granting the developmental application. After setting aside the grant, the MSD requested PacTel to provide to the Commission the complete details of the circumstances surrounding the unauthorized developmental tests and the steps PacTel would take to prevent such an occurrence in the future.

4. By letter dated August 3, 1992, PacTel explained that individuals responsible for conducting the tests did not terminate testing despite being notified of the expiration of the developmental authorization, and that the program coordinator for PacTel's project had left the employ of PacTel in June 1992 and, thus, PacTel could not determine exactly why testing had been allowed to continue. PacTel further stated that to prevent a recurrence of unauthorized testing, it instituted procedures providing management with more advance notice when a developmental authorization nears expiration in order to take appropriate action, and that individuals responsible for testing were instructed not to test equipment without an effective developmental authorization from the Commission.

5. As mentioned above, PacTel was required to file information pursuant to Section 22.406(a) of the Commission's Rules at the conclusion of its developmental authorization ending February 6, 1992.

6. As a result of PacTel's response, the MSD on August 4, 1992, granted PacTel developmental authorization, through August 3, 1993.

7. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's Rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Moreover, Section 22.406(a) of the Commission's Rules states in relevant part:

> Upon completion of the program of research and development, or, in any event, upon the expiration of the instrument of station authorization under which such investigations were permitted ... the licensee shall submit, in duplicate, a comprehensive report on the following items, in the order designated...

Therefore, because PacTel continued testing after expiration of its developmental authorization, thereby resulting in unauthorized operation, and because PacTel failed to file a timely developmental report consisting of information ascertained during its developmental authorization upon the expiration of its developmental authorization, PacTel is in apparent violation of Section 301 of the Communications Act and Sections 22.3 and 22.406(a) of the Commission's Rules.

8. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--

[1] PacTel ultimately filed the required report on June 10, 1992, which consisted of its digital cellular system demonstration report for the San Diego Metropolitan Statistical Area.

> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter ... shall be liable to the United States for a forfeiture penalty.

We find that PacTel's testing of equipment after February 6, 1992, resulting in unauthorized operation, and PacTel's failure to timely file the information obtained during the developmental authorization period ending February 6, 1992, constitute willful and repeated conduct within the terms of the statute.[2]

9. Pursuant to *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for unauthorized operation is $40,000, and the base forfeiture amount for failing to file required information is $30,000, for a total of $70,000. Consistent with the *Policy Statement*, we are adjusting downward the $40,000 base figure to $28,000 because PacTel voluntarily disclosed its unauthorized operation, and we are adjusting downward the $30,000 base figure to $6,000 because PacTel voluntarily disclosed its failure to file the information and because failing to file the required information is a relatively minor violation. Therefore, the total forfeiture for which PacTel is apparently liable is $34,000.

10. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. Sec. 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, PacTel Cellular IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of thirty four thousand dollars ($34,000) for willful and repeated violations of the aforementioned statutory and rule provisions. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

11. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this Notice, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[2] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) of the Communications Act. *See* H. R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 27, 1993

Action by the Commission January 27, 1993.

FEDERAL COMMUNICATIONS COMMISSION

TARIFF FILING REQUIREMENTS FOR NONDOMINANT COMMON CARRIERS

On November 13, 1992, the United States Court of Appeals for the District of Columbia Circuit vacated, as part of its ruling on the Commission's disposition of a section 208 complaint, *AT&T Communications v. MCI Telecommunications Corp.*, 7 FCC Rcd 807 (1992), the permissive detariffing rules as applied in the Commission's *Fourth Report and Order* in the *Competitive Carrier* proceeding. *See AT&T Co. v. FCC*, No. 92-1053 (D.C. Cir. Nov. 13, 1992); 95 FCC Rcd 554 (1983). On December 28, 1992, the Commission petitioned the court for rehearing *en banc*. This petition was denied on January 21, 1993. Under court rules, the mandate will issue on January 28, 1993, unless a party petitions the court for a stay of the mandate. The Commission is currently considering whether to seek Supreme Court review.

The permissive detariffing (forbearance) rules invalidated in *AT&T Co. v. FCC* excused certain nondominant carriers from the tariff filing requirements of section 203 of the Communications Act of 1934. In light of the court's decision, effective upon issuance of the mandate, previously forborne nondominant common carriers must file tariffs pursuant to section 203. The Commission intends to initiate expeditiously a rulemaking proceeding considering whether to revise and/or further streamline the tariff filing requirements for nondominant carriers. In the interim, the Commission does not intend to reject tariff filings from carriers affected by the court's order for failure to comply with the technical requirements sections of our rules regarding the form of tariffs, such as section 61.54. 47 C.F.R. § 61.54. Further, as a matter of prosecutorial discretion, the Commission does not intend to initiate independent enforcement action for such technical rule violations against those carriers. These technical rules affect only tariff format; thus, our decision not to enforce our technical rules will not diminish our ability to carry out our obligations under Title II of the Communications Act. 47 U.S.C. § 201 *et seq.* The Commission will accept tariff filings from these carriers on three and one-half inch floppy diskettes. If a carrier chooses to file on diskette, the diskettes should be in IBM compatible form using MS DOS 5.0 and Word Perfect 5.1 software. Whether submitted in diskette or paper format, the tariff should be accompanied by a paper copy of the cover letter.

Although the Commission will not enforce the technical requirements of Part 61 for carriers affected by the court's order, these carriers are required to pay tariff filing fees ($490 per filing) as set forth in Section 8 of the Communications Act, as amended, 47 U.S.C. § 158.

For further information, contact Mary Brown, Tariff Division, Common Carrier Bureau, at (202) 632-6387, or Andy Lachance, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-1305.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 27, 1993

EXPANDED INTERCONNECTION FILING DATES ESTABLISHED FOR RESPONSES TO INDIANA UTILITY REGULATORY COMMISSION'S REQUEST FOR WAIVER OF FEBRUARY 16, 1993 DEADLINE FOR FILING PHYSICAL COLLOCATION TARIFFS

CC Docket No. 91-141

On October 19, 1992, the Federal Communications Commission (Commission) released a Report and Order and Notice of Proposed Rulemaking in *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (FCC 92-440), 7 FCC Rcd 7369 (1992) (Order). On January 25, 1993, the Indiana Utility Regulatory Commission (Indiana) filed a request for waiver of the Commission's requirement that Tier 1 local exchange carriers file physical collocation tariffs by February 16, 1993. Indiana states that it expects to issue a final state collocation decision by February 16, 1993, but requests an extension until at least November 30, 1993.

Comments on the Indiana waiver request must be filed by Thursday, February 4, 1993 and replies by Wednesday, February 10, 1993 with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Parties also should send copies of comments and replies to Linda L. Haller, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554 and to the Commission's new contractor for public service records duplication: ITS, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the Indiana waiver request can be obtained from ITS at 202-857-3800.

This remains a non-restricted rulemaking proceeding for purposes of the Commission's *ex parte* rules. *Ex parte* presentations are permitted, except during any Sunshine Agenda period, provided they are disclosed as described in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206. For further information, contact Linda L. Haller (202-632-1298), Policy and Program Planning Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-256

In the Matter of

Application of Open Network
Architecture and
Nondiscrimination Safeguards
to GTE Corporation

ORDER

Adopted: January 27, 1993; Released: January 27, 1993

By the Chief, Policy and Program Planning Division:

1. On November 5, 1992, the Commission adopted a Notice of Proposed Rulemaking (NPRM) proposing to apply to GTE Corporation (GTE) the same regulatory framework of Open Network Architecture and nondiscrimination safeguards that applies to the Bell Operating Companies' participation in the enhanced services market.[1] The Commission requested comment on the NPRM by February 1, 1993 and reply comment by March 3, 1993.

2. On January 25, 1993, GTE requested a 30-day extension of time to file comments and reply comments. GTE states that it is critically important to them that a carefully prepared and complete submission be made. GTE also states that the personnel working on GTE's comments in this proceeding are heavily committed to working on comments in other proceedings.[2]

3. In light of the importance of the issues presented in this proceeding, we conclude that the public interest would be served by allowing GTE and other interested parties some additional time for filing comments. A brief extension additionally would not unduly delay the timely completion of this proceeding. We therefore grant in part GTE's request for an extension of time. We will extend by 21 days the deadline for interested parties to file comments and reply comments in this proceeding.

4. ACCORDINGLY, IT IS ORDERED that comments to the NPRM are due **February 22, 1993** and reply comments are due **March 24, 1993**.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief,
Policy and Program Planning Division

[1] *See* Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Notice of Proposed Rulemaking, CC Docket No. 92-256, FCC 92-495, adopted November 5, 1992.

[2] *See* Transport Rate Structure and Pricing, CC Docket No. 91-213 (comments due February 1, 1993); Expanded Interconnection with Local Telephone Companies, CC Docket No. 91-141 (petition for reconsideration comments due February 3, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LCT LONG DISTANCE, INC. File No. I-T-C-92-050

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 22, 1993; Released: February 3, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched service to the general public by LCT Long Distance, Inc. (LCT).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-050 IS GRANTED, and LCT is authorized to provide international switched services by the resale of the international switched services of Wiltel, Inc. pursuant to the contract between Wiltel and LCT, between the U.S. and the international points served by Wiltel, subject to the following conditions:

a. that the contract between LCT and Wiltel or a contract summary shall be publicly filed in accordance with Section 203 of the communications Act of 1934, as amended, 47 U.S.C. §203, and the *Interexchange Order*, 6 FCC Rcd 5880, 5902; and

b. that the services LCT obtains from Wiltel shall be made generally available to similarly situated customers at the same terms, conditions and rates.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONESIAN TELECOMMUNICATIONS CORPORATION — File No. S-C-L-92-003

Application for a license to Land and Operate a High Capacity Digital Submarine Cable System Extending Between the Commonwealth of the Northern Mariana Islands and Guam

CABLE LANDING LICENSE

Adopted: January 21, 1993; Released: February 3, 1993

By the Chief, Common Carrier Bureau:

1. The Commission has under consideration an application filed by the Micronesian Telecommunications Corporation (hereinafter MTC or Applicant) for a license pursuant to the provisions of an Act entitled "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system, known as the MTC Interisland Cable, in United States territory. The application was placed on the Commission's public notice. IT&E Overseas, Inc. (IT&E) filed a petition to condition or deny the application in response to which MTC filed an opposition.

2. The MTC Interisland Cable will link the islands of Saipan, Tinian and Rota, all of which are included in the Commonwealth of the Northern Mariana Islands (CNMI). The cable will then extend between Rota and Guam. MTC notes that the MTC Interisland Cable will supplement existing facilities used to provide regularly authorized services in CNMI and between CNMI and Guam and beyond.

3. The MTC Interisland Cable will be a high capacity, fiber optic, lightguide submarine cable system with a design capacity equivalent to 24,192 voice grade channels. The system will consist of twelve fibers each operating at a SONET (Sychronous Optical Network) rate of 622 Mbps. It will be repeaterless because of the relatively short distances between the cable landing sites.

4. By letter dated November 25, 1992, the State Department informed the Commission that it has no objection to the application to land in U.S. territory and operate the MTC Interisland Cable system. In light of the State Department's letter and the Commission's finding in the related Section 214 application to construct and operate the MTC Interisland Cable (File No. I-T-C-92-140), we find that a grant of a cable landing license for the MTC Interisland Cable will serve the public interest.

5. In light of the above considerations, the Commission hereby GRANTS AND ISSUES, under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. §§ 34-39, and pursuant to the authority delegated to this Commission under Executive Order 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p. 189 (1961), reprinted in 3 U.S.C.A. § 301 at p. 1052 (1985), to the Applicant herein a license to land and operate a high-capacity fiber optic digital submarine cable having the capacity specified in paragraph 3, supra, between Saipan, Tinian, and Rota in the Commonwealth of the Northern Mariana Islands (CNMI) and between Rota and Guam. This license is subject to "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. §§ 34-39; the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-609; subsequent applicable acts; all relevant rules and regulations of the Federal Communications Commission made pursuant to authority vested in it; any treaties or conventions relating to communications to which the United States of America is or may hereafter become a party; any action by the Commission or the Congress of the United States of America rescinding, changing, modifying or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensee or any persons or companies controlling it or controlled by it does not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling it or controlled by it are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of

Submarine Cables in the United States," 47 U.S.C. §§ 34-39, or for failure to comply with the terms of the authorization;

(6) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

6. This order is issued under Section 0.291 of the Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter

MICRONESIAN TELECOMMUNICATIONS CORPORATION — File No. I-T-C-92-140

Application for authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the MTC Interisland Cable between the Commonwealth of the Northern Mariana Islands and Guam

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 21, 1993; Released: February 3, 1993

By the Chief, Common Carrier Bureau:

1. The Commission has under consideration an application filed by the Micronesian Telecommunications Corporation (hereinafter MTC or Applicant)[1] for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct and operate a high capacity digital submarine cable system, known as the MTC Interisland Cable.[2] The application was placed on the Commission's public notice. IT&E Overseas, Inc. (IT&E) filed a petition to condition or deny the application and MTC filed an opposition in response.

2. The MTC Interisland Cable will link the islands of Saipan, Tinian and Rota, all of which are included in the Commonwealth of the Northern Mariana Islands (CNMI). The cable will then extend between Rota and Guam. The MTC Interisland Cable will be a high capacity, fiber optic, lightguide submarine cable system with a "design capacity equivalent to 24,192 voice grade channels. The system will consist of twelve fibers each operating at a SONET (Sychronous Optical Network) rate of 622 Mbps. It will be repeaterless because of the relatively short distances between the cable landing sites.

3. According to MTC, the MTC Interisland Cable will supplement existing facilities used to provide regularly authorized services in CNMI and between CNMI and Guam and beyond.[3] MTC states that it currently provides service between Saipan, Tinian, Rota and Guam via an analog microwave system. Existing traffic will be transferred to the fiber optic MTC Interisland Cable from the analog microwave system which will be retained as a back-up for the Saipan to Tinian to Rota segments. Digital satellite facilities will be used as a back-up for the Rota to Guam segment. MTC states that the change from analog to digital fiber optic facilities will allow it to provide its customers with more efficient and modern services. MTC notes that use of the existing microwave system is difficult due to the distance between the islands and because tropical storms and typhoons occurring in the Pacific make it more susceptible to disruption than submarine cable facilities. In addition, MTC notes that the number of telephone subscribers in CNMI has been growing to the point that there is inadequate capacity in the analog microwave system to meet forecasted customer demand.

4. IT&E filed a petition to condition or deny the application based on alleged violations of the GTE Consent Decree[4] and alleged anticompetitive conduct by MTC. Specifically, IT&E cites several examples of anticompetitive conduct which primarily relate to its inability to have what it deems suitable access to scarce facilities controlled by MTC. IT&E also claims that the GTE Consent Decree prohibits MTC from constructing the planned facilities between the CNMI and Guam, both domestic points, and that a waiver would be required. IT&E states that these issues will be pursued more formally before the Department of Justice in the context of a request for investigation and enforcement of the GTE Consent Decree.[5] However, IT&E believes that any Commission authorization should be conditioned on the outcome of the Department of Justice's response to both of these issues, including IT&E's request that MTC be required to jointly construct and operate the proposed cable facilities with IT&E and other interested parties.[6]

---

[1] MTC is a subsidiary of the Hawaiian Telephone Company (HTC) which is a subsidiary of GTE Corporation.

[2] Concurrent with the filing of this application, MTC filed a separate application for a cable landing license in File No. S-C-L-92-003. Action on MTC's application for a cable landing license was taken concurrently with our decision herein.

[3] MTC does not specify the additional points it will serve on an "and beyond" basis and whether these points will be international or other U.S. points. However, in its opposition to IT&E's petition MTC indicates that the cable will not violate the GTE Consent Decree because it permits international service to be provided.

[4] United States v. GTE Corporation, Civ. Action No. 83-1298, Trade Cas. (CCH) 66,355 (D.D.C. 1985) ("the GTE Consent Decree").

[5] On May 30, 1992 IT&E filed with the Department of Justice to investigate specific activities of GTE Hawaiian Telephone Company and MTC, both subsidiaries of GTE Corporation. Among the activities cited by IT&E is the proposed construction of the MTC Interisland Cable.

[6] IT&E also requests that an exhibit, filed by MTC on March 30, 1992, containing revenue forecasts and circuit activation plans be released for public inspection. The exhibit was filed under separate cover with a request for confidentiality. We disagree with IT&E's suggestion that since the document was filed as part of MTC's application for a cable landing license, it must be open for public inspection pursuant to Section 1.767(c) of the Commission's Rules. Section 1.767(c) provides in part that "Such applications for licenses (including all documents and exhibits filed with and made a part thereof, with the exception of any maps showing the exact location of the submarine cable or cables to be licensed)....shall, unless otherwise ordered by the Commission be open to public inspection." While Section 1.767(c) creates a general presumption of public availability, it is not intended to supersede the Commission's Rules regarding requests that materials or information submitted to the Commission be withheld from public inspection. *See* 47 C.F.R. § 0.459. Where a document is submitted under a request that it not be made available for public inspection, Section 0.461 of the Commission's Rules, 47 C.F.R. § 0.461, sets

5. MTC denies the allegations of anticompetitive conduct as well as IT&E's claims that the proposed cable violates the GTE Consent Decree. MTC notes that Section V(C)(1) of the GTE Consent Decree specifically permits Hawaiian Telephone Company, and inherently its subsidiary MTC, to provide international services. MTC states that these issues are not properly raised in the context of a Section 214 application since the GTE Consent Decree is administered by the District Court and the Department of Justice. Finally, MTC asserts that it is not obligated to offer IT&E an ownership interest in the proposed cable, since control of the cable is necessary to ensure that facilities will be available to serve the residents of CNMI.

6. We dismiss IT&E's petition to deny or condition the application because of alleged violations of the GTE Consent Decree. It is the District Court and the Department of Justice, and not this Commission, that are charged with determining whether certain actions are in violation of the GTE Consent Decree. IT&E acknowledges that the issues raised will be addressed in a formal investigation by the Department of Justice. Our authorization herein will be subject to any decision by the Department of Justice and the District Court with respect to the alleged violation of the GTE Consent Decree. The Commission will take appropriate steps, if necessary, once a decision is rendered on this issue. Thus, there is no need to condition MTC's authorization to construct and operate the subject facilities.

7. After consideration of the application and petition filed by IT&E, we conclude that the construction and operation of the MTC Interisland Cable will serve the public convenience and necessity. The MTC Interisland Cable will introduce digital fiber optic cable technology to the CNMI which will improve service because the current analog microwave system is more susceptible to tropical storms and typhoons than submarine cable facilities. In addition, MTC states that the number of telephone subscribers in CNMI has been growing to the point that there is inadequate capacity in the analog microwave system to meet forecasted demand. However, our finding herein does not in any way prejudge any action by the District Court or Department of Justice concerning the applicability of the GTE Consent Decree to this project. Thus, any decision to proceed with the construction and operation of this cable by MTC will be at its own risk.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-92-140 IS GRANTED and MTC is authorized to:

(a) construct and operate a digital fiber optic submarine cable system (MTC Interisland Cable) extending between the islands of Saipan, Tinian and Rota, all of which are included in the Commonwealth of the Northern Mariana Islands (CNMI) and between Rota and Guam; and

(b) activate and operate the capacity in the MTC Interisland Cable for the provision of its regularly authorized telecommunications services.

9. IT IS FURTHER ORDERED that IT&E's petition to condition or deny the application IS DISMISSED.

10. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between the points served by the MTC Interisland Cable system.

11. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to the Applicant herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. Sections 34-39), covering the subject submarine cable, and shall become effective upon the acceptance of the aforementioned license by MTC.

12. This order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

---

forth a procedure that a party requesting inspection of such document must follow. IT&E's request does not comply with this procedure.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE RAILFONE INCORPORATED — File No. I-T-C-92-245

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to operate as a resale carrier

ORDER AND AUTHORIZATION

Adopted: January 25, 1993; Released: February 3, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by GTE Railfone Incorporated (GRI) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-245 IS GRANTED and GRI is authorized to provide international switched message telephone service (IMTS) between passenger trains and other locations in the U.S. and international locations through the resale of the IMTS services listed in the tariffs of various cellular carriers who, in turn, either provide to GRI on a resale basis the service of underlying facilities-based international carrier or provides service to GRI as the international carrier's billing agent.[1]

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] GRI notes that it cannot specify the underlying facilities-based international carriers that will be used since it has no control over the cellular carrier's selection of such carriers.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-96

In re Applications of

SUNBELT, LIMITED PARTNERSHIP	File No. BPH-880308ME
TROY BROADCASTING CORPORATION	File No. BPH-880310MJ
RALPH W. BLACK, JR.	File No. BPH-880310MT

For Construction Permit for
New FM Station, Channel 234A
in Brundidge, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 1993; Released: February 3, 1993

By the Commission:

1. Before the Commission are Applications for Review filed on August 10, 1992 by Sunbelt, Limited Partnership ("Sunbelt") and Ralph W. Black, Jr. ("Black"), two of the three remaining applicants in this comparative case. Sunbelt and Black seek review of a Review Board decision[1] that affirmed the Initial Decision (I.D.) of Administrative Law Judge Edward J. Kuhlmann (ALJ)[2] granting the application of the third competing applicant, Troy Broadcasting Corporation ("Troy"), for a construction permit for a new FM station in Brundidge, Alabama.[3] We agree with the Board's resolution of this proceeding. However, one matter warrants brief comment.

2. In affirming the ALJ's decision to award the Brundidge permit to Troy, the Board reduced Sunbelt's integration credit from 100%, awarded by the ALJ, to 33%. It determined that the 66 2/3% interest of Sunbelt's limited partners must be attributed to Sunbelt in calculating its integration credit because the partnership agreement fails to meet certain requirements we established in *Attribution of Ownership Interests* concerning restrictions on the rights of limited partners to remove the general partner in circumstances where the applicant is attempting to demonstrate that the limited partners will be insulated from management of the proposed facility.[4] *See* 97 FCC 2d 997 (1984), recon. granted in part, 58 RR 2d 604, 619-620 ¶ 49 (1985), further recon. granted in part, 1 FCC Rcd 802, 803 ¶ ¶ 5-6 (1986).[5]

3. The Board focused on the fact that the Sunbelt agreement does not preclude the limited partners from determining that the general partner is incompetent, though *Attribution of Ownership Interests* indicates responsibility for such a finding should be given to a court of competent jurisdiction. *Decision* at 4396 ¶13.[6] In this regard, it should be emphasized that the agreement fails to incorporate any restriction that limits removal for "cause" to circumstances where there is first a determination by an independent party that, due to the malfeasance, criminal conduct, or willful neglect of the general partner, removal is warranted. *See* 58 RR 2d at 619-620 ¶49; 1 FCC Rcd at 803 ¶ ¶ 5-6.[7] In fact, in one circumstance the Sunbelt agreement effectively permits removal without an independent finding that "cause" exists; it requires that the general partner convey all but .1% of his interest without compensation to a substitute general partner if, at any time during the first

---

[1] *Decision*, 7 FCC Rcd 4394 (Rev. Bd. 1992).

[2] *Initial Decision*, 6 FCC Rcd 5734 (1991).

[3] Troy filed a Contingent Application for Review on August 10, 1992 to protect its right to seek judicial review in the event the Commission fails to uphold the ALJ's and Review Board's decisions granting the permit to Troy. *See* 47 C.F.R. § 1.115(k). On August 25, 1992 Troy also filed Oppositions to Black's and Sunbelt's Applications for Review. Black filed an Opposition to Troy's Contingent Application for Review and Sunbelt filed a consolidated Opposition to Troy's Contingent Application for Review and to Black's Application for Review.

[4] There is no merit to Sunbelt's argument that the Board was precluded from considering Troy's exceptions concerning the partnership agreement because these arguments had assertedly not previously been raised before the ALJ. *Cf. Marlin Broadcasting of Central Florida v. Federal Communications Commission*, 952 F. 2d 507, 514 (D.C. Cir. 1992) (Commission is authorized but not required to limit its review to those issues raised in a prior stage of proceeding); *see also I.D.* at 5744-45 ¶ ¶ 23-24 and 5749 ¶58 concerning insulation of Sunbelt's limited partners.

[5] The requirements set forth in *Attribution of Ownership Interests* for avoiding attribution of the broadcast interests of limited partners to the applicant are also used to determine whether the limited partners' interests should be counted for integration purposes. *Cotton Broadcasting Company*, 4 FCC Rcd 1781, 1783 ¶ ¶ 19-21 (1992); *Daytona Broadcasting Company, Inc.*, 103 FCC 2d 931, 935 n.6 (1986).

[6] Sunbelt argues in its Application for Review that, if paragraphs 18(b) and 18(c) of the partnership agreement are read together, they mean that, absent a court finding of incompetency, the general partner cannot be removed for reasons of incompetency. However, the use of the term "or" with the various subparts of paragraph 18 indicates that each subpart is a separate cause for dissolution of the partnership. In any event, those matters are unrelated to the limited partners' removal rights, as further discussed below.

[7] We reject Sunbelt's argument that the partnership agreement satisfies all Commission requirements because it "does not confer upon the limiteds the right to remove the general, under any circumstances...." Application for Review at 4, n.5. *Attribution of Ownership Interests* requires an affirmative showing of appropriate insulation from management, not merely a showing based on negative inferences or silence. *See, e.g.*, 58 RR2d at 620 ¶ 49. ("The partnership agreement should either *prohibit* the exempt limited partners from voting on the removal of a general partner or *limit* this right to situations where the general partner is subject to bankruptcy proceedings ... or is adjudicated incompetent ....") (emphasis added). We also reject Sunbelt's argument that provisions giving the general partner the right to veto the admission of any new or substitute partner equate to the necessary provisions restricting the limited partners' removal rights. The removal rights of limited partners and the rights of the general partner as to admission of a new general partner are separate issues, and thus the inclusion of the latter provision does not fulfill the *Attribution of Ownership Interests* requirement concerning removal provisions. *See id.*.

three years after grant of the FCC license, he fails to commit himself full-time (defined as "at least 40 hours per week") to his duties at the station.[8]

4. Both the absence of general restrictive provisions and the presence of a provision that explicitly permits the general partner to be stripped of his interest in the partnership without compensation and without the intervention of an independent third party to determine whether dilution is in fact justified gives the limited partners in Sunbelt a degree of leverage over the general partner that is inconsistent with the notion that the general partner is insulated from influence. *See Doylan Forney*, 5 FCC Rcd 5423, 5424 ¶ 8 (1990). In such circumstances, the interest of the limited partners must be attributed to the applicant -- in this case resulting in the reduction of Sunbelt's integration credit to 33 1/3%.[9] Since Troy is entitled to its full 100% integration credit,[10] reduction of Sunbelt's integration credit is dispositive and the permit was therefore correctly awarded to Troy.

5. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. §1.115(g), the applications for review filed on August 10, 1992 by Sunbelt, Limited Partnership and Ralph W. Black, Jr. ARE DENIED and that the contingent application for review filed on August 10, 1992 by Troy Broadcasting Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[8] Sunbelt Partnership Agreement ¶ ¶ 14-15. Paragraph 17 of the agreement appears to permit the general partner's voting interest to be reduced to 1%, not .1%. In either case, to find that an ability to so drastically reduce the general partner's interest avoids the prohibition against unrestricted removal rights would elevate form over substance.

[9] In light of our conclusions concerning the inadequacy of Sunbelt's partnership agreement, we need not consider whether the involvement of Sunbelt's limited partners, R.E. Shelley and John B. Crawley, in the applicant's affairs provides a separate ground for reducing Sunbelt's integration credit. Nonetheless, we note that Sunbelt was originally conceived as a corporation and was converted to a partnership approximately ninety days after the Brundidge application was filed, on the deadline for filing amendments of right. Though Sunbelt principals maintain that their intent from the beginning was that Shelley and Crawley would act only as passive investors, *I.D.* at 5744-45 ¶ ¶ 23-24, it appears that, inter alia, Crawley negotiated an extension of Sunbelt's site option, an action commonly considered "legal services," and that he investigated a competing applicant for use in proceedings before the Commission. *Id.* Under these circumstances, it is clear that additional questions would have to be addressed concerning the reliability of Sunbelt's proposal that the general partner will be the exclusive full-time manager of the station before it could be awarded the full integration credit that it seeks. *See, e.g., Magdalene Gunden Partnership*, 6 FCC Rcd 5976 (1991); *Coast TV*, 5 FCC Rcd 2751 (1990).

[10] *I.D.* at 5749 ¶ ¶ 60, 62. Contrary to Sunbelt's arguments, even though Troy owners James Roling and Joe Gilchrist, proposed sales manager and chief engineer/operations manager respectively, will spend significant time performing non-managerial duties at the station, Troy is still entitled to full integration credit for them as long as they will also perform sufficient managerial duties. *See generally, Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607 (fulltime integration credit accorded even though sales manager proposed to devote initially 32-33 hours per week to direct sales and learn the market); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6128 ¶ 26 (1987) (integration credit accorded to operations manager who would also spend time on non-managerial duties). Substantial evidence supports the conclusion that Roling and Gilchrist will perform managerial duties of a sufficient nature to warrant the credit awarded here. *I.D.* at 5745 ¶ ¶ 30, 31.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHILIPPINE LONG DISTANCE TELEPHONE,
Complainant,

v. File No. IC-92-05769

WORLD COMMUNICATIONS, INC.,
Respondent.

In the Matter of

WORLD COMMUNICATIONS, INC., NAL/Acct. No. 216E10001

and

MANILA PENINSULA HOTEL NAL/Acct. No. 216EI0002
Apparent Liability for Forfeiture

ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURES

Adopted: January 22, 1993; Released: January 22, 1993

By the Commission:

I. INTRODUCTION

1. In this order, we address a complaint filed by Philippine Long Distance Telephone ("PLDT") against World Communications, Inc. ("WorldCom") alleging that WorldCom, in conjunction with Globe-MacKay Cable and Radio Corporation ("GMCR"), is operating in violation of this Commission's international resale policy by providing one-way resale of international private line service from the Manila Peninsula Hotel ("Peninsula" or "the hotel") in the Philippines to the United States ("U.S."). WorldCom has denied such allegation and moved to dismiss the complaint. For the reasons stated below, we are notifying WorldCom and Peninsula of their apparent liability for forfeitures in the amount of $206,000 and $200,000, respectively, for reselling international private lines without the requisite authorization in violation of Section 214(a) of the Communications Act.

II. BACKGROUND

2. In 1991, this Commission proposed a number of steps as part of our continuing regulatory oversight of international settlements arrangements and our goal of lower, more economically-efficient, cost-based accounting and collection rates for common carrier services to and from the U.S.[1] In our *International Resale Order*, we addressed our proposal to encourage resale of international common carrier services as a way to exert downward pressure on above-cost international accounting and collection rates.[2] We required U.S. carriers to permit unlimited resale of all their international switched telecommunications services.[3] We also required U.S. carriers to permit resale of their international private line services but only on those routes where equivalent resale opportunities are provided to carriers in the foreign market. This restriction was implemented in three ways. First, we ordered U.S. carriers to amend their tariffs, within ten days of the publication of our decision in the Federal Register, to:

> explicitly state our policy that the user may engage in resale of the international private line for the provision of a basic telecommunication service upon authorization from the Commission under Section 214 of the Communications Act of 1934, and that such authorization will be granted only to countries where the applicant can demonstrate that the foreign government or administration affords equivalent resale opportunities. (footnote omitted)[4]

3. Second, because resale is a common carrier activity,[5] we required that a user wishing to resell international private lines for the provision of a basic telecommunications service "must first obtain certification as an international common carrier under Section 214 of the Communications Act," and we indicated that such applications would not be granted unless equivalent resale op-

---

[1] Regulation of International Accounting Rates, Further Notice of Proposed Rule Making, 6 FCC Rcd 3434 (1991).

[2] Regulation of International Accounting Rates, Phase II, 7 FCC Rcd 559 (1991) (*International Resale Order*), *petitions for reconsideration granted in part*, 7 FCC Rcd. 7927 (1992) (*Reconsideration Order*).

[3] *International Resale Order*, 7 FCC Rcd at 566, n.18.

[4] *Id.* at 562. The *International Resale Order* was published in the Federal Register on January 8, 1992. 57 F.R. 646 (Jan. 8, 1992). WorldCom issued an appropriate revision to its tariff. *See* World Communications, Inc., Tariff F.C.C. No. 1, original page 8.1 (effective Feb. 7, 1992) which provides, in Section C, Rules and Regulations, Section 2.06 that:

> International private network service obtained pursuant to this tariff for the purpose of resale for the provision of third party services requires authorization from the Federal Communications Commission, and a demonstration that the foreign government or administration affords equivalent resale opportunities.

[5] In *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Service and Facilities* (hereafter *Domestic Resale Order*), 60 FCC 2d 261 (1976), *reconsid.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F. 2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978), the Commission held that the resale of a common carrier service is itself a common carrier service and requires the reseller to be certificated as a common carrier under Section 214 of the Act. 60 FCC 2d at 308. Our *Internation al Resale Order* adopted this regulatory classification with respect to resale of international private lines as well. 7 FCC Rcd at 562.

portunities were available in the foreign country.[6] Third, we amended Section 43.51 of our rules "to require that carriers file with the Commission any agreement for the interconnection of private lines to the public switched network (PSN)." (footnote omitted).[7] We stated that the "filing of these arrangements should be sufficient to determine whether carriers are reselling international private lines without appropriate Section 214 certification or otherwise undermining Commission policies."[8] We further stated that a violation of our international resale policies "may be challenged at any time by either the Commission or an interested person."[9] Finally, we stated that we had "ample authority through, for instance, Sections 312(b) and 503 of the Communications Act and our international settlement policies, to take corrective action for violations of our decision herein that resale should occur only on routes that afford equivalent resale opportunities."[10]

III. THE PARTIES' PLEADINGS

4. On April 14, 1992, PLDT[11] filed an informal complaint with the Commission alleging that WorldCom and GMCR, WorldCom's foreign correspondent,[12] are offering services in violation of the Commission's policy prohibiting one-way resale in connection with calls to the U.S. from guests of Peninsula in Manila, Republic of the Philippines. More particularly, PLDT alleged that PLDT's switched public international message telephone service ("IMTS") is being used as an overflow for Peninsula's outbound traffic over its resold international private lines. According to PLDT, a customer dialing a standard IMTS number in the U.S. from the hotel is unaware whether the call is routed to a U.S. carrier's switched network or is routed over the hotel's resold international private lines. Moreover, according to PLDT, an identical charge is levied on the customer in either case.

5. In support of its complaint, PLDT states the following: GMCR installed eight digital lines equipped with International Direct Dialing ("IDD") capability at the private telephone exchange ("PBX") of Peninsula, which enables the hotel's guests to make IDD calls to the U.S. without passing through PLDT's "gateway" facilities. A call from a guest of the hotel passes through the hotel's PBX and is transmitted to any of the eight lines installed by GMCR. These lines are connected to a cable PLDT had previously installed at GMCR's request. The cable, in turn, is connected to a GMCR sub-office at Vernida Building, about one kilometer from the hotel.[13] Voice signals are transmitted from GMCR's Vernida Building office to its head office in Manila, a distance of approximately five kilometers, through a GMCR microwave circuit. The call then is routed to Time Division Multiplexing equipment, then to a dedicated cable linking GMCR to PLDT's international circuit terminal in Sampaloc, Manila.[14] From there the call is sent by submarine cable via Guam and Hawaii to San Francisco, California where American Telephone and Telegraph Company ("AT&T") sends it to WorldCom's switch in New York, where it apparently is interconnected to the U.S. PSN.[15] From there the call can be transmitted to any place in the U.S.[16]

6. PLDT further states that, through software programming of the Peninsula PBX, GMCR facilities have access priority over PLDT trunk lines provided with the IDD feature; PLDT toll circuits only serve as overflow when all eight GMCR IDD lines are being used simultaneously; the hotel's guests can place international and domestic calls from their rooms through Direct Distance Dialing ("DDD"); the hotel's PBX system is not capable of determining whether a guest used a PLDT or a GMCR IDD line when calling abroad; whether a PLDT or GMCR line was used can be determined by comparing the hotel's toll records with the respective toll billings of PLDT and GMCR; and that there was a 64 percent reduction in toll

---

[6] *International Resale Order*, 7 FCC Rcd at 562.

[7] *Id.* at 559. On May 19, 1992, after new reporting requirements of Section 43.51(a)(3) of our rules had become effective, WorldCom reported an arrangement with its correspondent in the Philippines, GMCR, for the "interconnection of a customer's private line into the U.S. public switched network." Letter from Robert E. Conn to Donna R. Searcy (May 19, 1992). Worldcom stated that such arrangement predated the adoption of Section 43.51(a)(3) and that "[a]lthough it is not clear whether the foregoing arrangement is subject to the new reporting requirements of Section 43.51(a)(3), this report is being submitted out of an abundance of caution." *Id.* Since WorldCom's agreement predated the effective date of the rule, there is no requirement that it be filed with the Commission. However, because such agreement was in violation of Sections 214 and 203 of the Act, it is not enforceable.

[8] *International Resale Order*, 7 FCC Rcd at 562.

[9] *Id.* at 562-63.

[10] *Id.* at 563.

[11] PLDT provides domestic and international communications services in the Philippines.

[12] WorldCom is a U.S. international carrier subject to this Commission's jurisdiction. GMCR is a Philippine carrier and a competitor of PLDT. The principal U.S.-Philippine services provided by Worldcom in conjunction with GMCR are international private line services.

[13] To link Peninsula to GMCR's Vernida Building office, GMCR used 2 of its 5 subscribed PLDT private lines terminating at the hotel for multiplexing voice signals. These two private lines were multiplexed into the eight digital lines by connecting them at a modem interfaced to a multiplexer. In case of private line trouble, either of the 3 other GMCR subscribed private lines are used as spare cable facilities.

[14] PLDT's Sampaloc office is the sending and receiving point, for purposes of the Philippines, of the Guam-Philippines-Taiwan ("GPT") Cable System, a submarine cable system connecting the Philippines to the U.S. GMCR is a part owner of the GPT system.

[15] In its petition for reconsideration of the *International Resale Order*, AT&T made reference to the pleadings in this proceeding and stated that to develop an enforceable policy that will avoid adverse settlements impact, the Commission should not distinguish between end users and resellers when an international private line is interconnected to the U.S. PSN. Letter from Elaine R. McHale to Donna R. Searcy (July 14, 1992) (FCC should require U.S. carriers to obtain "international settlements policy waiver" before an international private line is interconnected to the U.S. PSN). In its *Reconsideration Order*, the Commission invited comment on AT&T's proposal to apply an equivalency requirement to all end users' international private lines interconnected at a U.S. carrier's central office, and on the most appropriate means of implementing such a requirement. 7 FCC Rcd. at 7930.

[16] *See* enclosures to complaint.

revenue collected from Peninsula in 1990 and 1991 attributable to the "remarkable" decrease in PLDT's toll circuit usage.[17]

7. In its June 2, 1992 response to the complaint ("Report"), WorldCom does not challenge PLDT's assertions that the telephone calls detailed in the attachment to the complaint occurred. WorldCom states, however, that the U.S.-Philippines services it furnishes in conjunction with GMCR are provided via cable circuits they jointly own and WorldCom is an underlying carrier in this case, not a resale carrier. WorldCom contends that the private line it and GMCR have furnished to Peninsula "is purely a private line even though it might be interconnected with the [PSN]" and is not covered by our *International Resale Order*.[18] Worldcom relies in this connection on our statement that we were not altering our "long-standing policy of allowing users to attach their private lines to the PSN for their private use."[19]

8. WorldCom further contends that we should not entertain the instant complaint from a "non-jurisdictional" foreign carrier who "is estopped from seeking relief from this Commission under the 'clean hands' doctrine."[20] WorldCom states that while PLDT maintains direct telephone operating relations with WorldCom's "giant U.S. competitors," by denying WorldCom a telephone operating agreement, "PLDT has discriminated against the smaller WorldCom, contrary to the Commission's pro-competitive policy favoring foreign operating agreements for U.S. international carriers ...."[21]

9. Finally, WorldCom contends that PLDT is attempting to inject this Commission into a pending intra-Philippine competitive dispute between PLDT and GMCR, concerning the scope and effect of a memorandum by the Philippine National Telecommunications Commission ("PNTC"), that PLDT attached to its complaint. Worldcom contends that such dispute over the lawfulness of Peninsula's private line circuit under Philippine law is a matter best left to Philippine government authorities.[22]

IV. DISCUSSION

10. Under Section 208 of the Communications Act, any "person"[23] or body politic may complain to us of anything done or omitted to be done, by any common carrier subject to the Act, that violates a provision of the Act. There is nothing in the Act, or in our rules implementing that section, that precludes a foreign carrier from bringing violations of the Act to our attention, even though the complainant may not be a U.S. company and may be involved in related litigation involving foreign law. Further, contrary to WorldCom's contention, PLDT is not estopped from filing the instant complaint even if, *arguendo*, it is acting anticompetitively in the Philippines, as WorldCom alleges. Also, our consideration of the violations of the Act that PLDT brought to our attention is neither intervention in a dispute over Philippine law between PLDT and GMCR nor approval of PLDT's alleged anticompetitive conduct in the Philippines. Accordingly, we will not dismiss PLDT's complaint for lack of standing.

11. Turning to the merits of the PLDT complaint, we conclude that Peninsula is engaged in the provision of an international voice message service that is the functional equivalent of IMTS, for profit, an activity for which certification as a common carrier is required, and that, since Peninsula has not been so certificated, Peninsula is in violation of Section 214 of the Act.[24] According to uncontroverted evidence in the record, on January 24, 1992, a customer of Peninsula placed calls from the hotel, through the hotel switch board, to two different telephone numbers in the U.S. and Peninsula billed the customer for those calls.[25] WorldCom does not challenge that Peninsula's customer made the calls or that WorldCom's international private lines were used to carry the calls to the U.S. PSN. Rather, Worldcom merely asserts that, as a general proposition, a private line customer "may permit authorized persons, including employees and invited guests, to use [its] private lines without running afoul of the FCC's [resale] policy."[26] For our part, we find no basis to conclude that the customer is an employee or agent of Peninsula or that he was making the calls for the purpose of carrying out Peninsula's business. Rather, we conclude that the customer has no relationship to Peninsula other than that of a customer paying for temporary lodging and, separately, for telephone service.[27] As a result, we conclude that the cus-

---

[17] *Id.* at 3.

[18] Report at 3.

[19] *Id., citing International Resale Order,* 7 FCC Rcd at 560.

[20] Report at 3-5.

[21] *Id.* at 4. According to WorldCom, PLDT is the dominant telecommunications carrier in the Philippines and controls over 90 percent of both the domestic and international telephone markets there.

[22] *Id.* at 5-7. That PNTC memorandum declares:

> Philippine-based subscribers of domestic and international leased line facilities cannot terminate or allocate any such leased facilities to the public switching system(s) of foreign telecommunications entities as to permit the routing of calls using the said leased line facilities to points outside of the Philippines and/or terminating in a subscriber's terminal equipment in the [sic] Philippines."

[23] The term "person" is defined in Section 3(i) of the Act as including "an individual, partnership, association, joint-stock company, trust, or corporation."

[24] Our *International Resale Order* adopted for the international market the definition of resale in the Commission's 1976 *Domestic Resale Order,* as "an activity wherein one entity subscribes to the communications services and facilities of another entity and reoffers the communications services and facilities to the public (with or without 'added value') for profit." 7 FCC Rcd at 565, n.7, *citing* 60 FCC 2d at 271.

[25] PLDT attached to its complaint a copy of a bill from Peninsula which includes charges for two calls from 625 to two telephone numbers in the U.S., one in New Jersey and one in California, and charges for three calls to telephone numbers within the Philippines. The bill lists the time of the calls, the numbers called, and the amounts charged. PLDT states that a review of its records shows the domestic calls but not the ones made to the U.S., from which it concludes that someone other than PLDT, the sole authorized Philippines international telephone carrier, carried the calls. PLDT offers this bill to substantiate its allegation that Peninsula is using the subject international private lines to provide international telephone service to the U.S.

[26] Report at 3.

[27] Because we conclude that the use of the private line in this matter was resale, we do not need to address the validity of WorldCom's general assertion that its customers may authorize

tomer would, with respect to Peninsula's private line, constitute a "third party" within the meeting of Section C2.06 of WorldCom's tariff[28] and that Peninsula's charging such customer to use its private line constitutes the provision of a communications service for hire.[29] Finally, since Peninsula provided the service using leased common carrier private lines, Peninsula's actions also constitute resale of private lines under our *International Resale Order*.

12. While it appears that Peninsula's main business activities occur in the Philippines and that the switching of the subject telephone calls occurred at the Philippines end, we express no opinion whether these actions constitute "resale" under the law of the Philippines. That is a matter for the Philippine authorities to decide. Our concern is with actions that occur within the territory of the United States. Although Peninsula does not have a physical presence in the U.S., it leases one-half of the international private lines in question from WorldCom, a U.S. international common carrier, and WorldCom, acting as Peninsula's "agent" (see para. 13, *infra*), terminates those half circuits at WorldCom's office in New York. We conclude that through such leased lines, Peninsula has an operating presence in the U.S. and is using such private lines and the U.S. PSN to provide international telephone service from the Philippines to telephones in the U.S. Since Peninsula charged at least one customer for two calls to the U.S., we conclude that Peninsula's actions constitute resale and that such resale falls within the jurisdiction of this Commission. Finally, we conclude that Peninsula is offering international telephone service to the U.S. by resale of an international private line which, under our *International Resale Order*, is classified as a common carrier activity for which a certificate of public convenience and necessity under Section 214 of the Act is required.[30] Since Peninsula has not obtained such a certificate, we conclude that it is in violation of Section 214.

13. As we have noted, WorldCom does more in this matter than merely provide the U.S. half of Peninsula's international private line. Rather, WorldCom has contracted with Peninsula, under WorldCom's tariff, to be Peninsula's "agent" in the U.S., to provide the physical premises on which Peninsula's private lines terminate and to effect an interconnection of the international private lines with the U.S. PSN.[31] Thus, WorldCom is a contractual party to the interconnection of Peninsula's international private line and, as a consequence, is also a contractual party to Peninsula's resale of the international private line.[32] The agency relationship established in the WorldCom tariff

---

persons to use their international private lines without limitation. We note in this connection, however, that the provision of telephone service to the hotel's clients does not come within the definition of an "authorized user" in WorldCom's tariff. Section B of WorldCom's Tariff F.C.C. No. 1, Original Page 5, defines an "authorized user" as "[a] person, firm or corporation authorized by the Customer to receive or send communications from or to the Customer only and relating solely to the Customer's business." WorldCom does not assert that the calls were made by an employee of the hotel or that they were made in the pursuit of the hotel's business. PLDT asserts that the calls were placed by a customer of the hotel and that their purpose was to show that they were carried to the U.S. by someone other than PLDT, the sole authorized Philippines international telephone carrier.

[28] That section provides that "[i]nternational private network service obtained pursuant to this tariff for the purpose of resale or the provision of third party services requires authorization from the Federal Communications Commission ..." WorldCom's tariff does not define "third party."

[29] Since the use of Peninsula's lines has not been exclusively for the hotel's business, that use of private lines also is contrary to the conditions of service in WorldCom's tariff. A private line may be generally characterized as a non-switched circuit dedicated to the customer's exclusive use. *See, e.g.*, Manual for Filing Section 43.61 Data in accordance with the FCC's Rules and Regulations, released July 22, 1992, which defines private line service as "the leasing of a dedicated channel of communications (leased circuit) for specified periods of time *for the customer's use*. " (emphasis added) *Id.* at 10. (*See* Order releasing manual, 7 FCC Rcd 4965 (Com.Car.Bur. 1992)). *See also* World Communications, Inc. Tariff F.C.C. No. 1 at Original Page 7, effective Oct. 6, 1989, describing WorldCom's Private Network Service as:

> furnishing for the *private use* of Customers or Authorized Users the requisite facilities for transmission and reception of ... communications between terminals as specified [in the tariff]. (emphasis added)
>
> Under WorldCom's tariff, an "Authorized User" may receive or send communications *from or to the Customer only* and *relating solely to the Customer's business*. " (emphasis added) *See* n.27, *supra*.

[30] We emphasize that, because Peninsula is engaged in international as opposed to domestic resale, it does not come within the revised regulatory treatment that we have prescribed for provision of domestic resale. Under our *International Competitive Carrier* decision, 102 FCC 2d 812 (1985), *recon. denied*, 12 R.R. 2d 1435 (1986), all carriers, non-dominant as well as dominant, must be certificated under Section 214 before offering an international common carrier service. This is true whether service is to be provided on a facilities or a resale basis. Even our recent revisiting of the international competitive carrier policy, *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992), which adopted streamlined regulatory procedures for international resale carriers, retained the certification requirement.

[31] WorldCom's tariff provides in Section C.6.01 that

> [t]he Customer [*i.e.*, Peninsula] may connect on his premises or on the premises of the Company [*i.e.*, WorldCom] the [private line] furnished pursuant to this tariff ... with service furnished within the United States ... by other carriers.

WorldCom's tariff further provides at Section C.6.03 that WorldCom

> will, however, where requested to do so by the Customer, make the necessary arrangements with a domestic [U.S.] carrier for landline extensions. In completing such arrangements on behalf of the Customer, [WorldCom] shall be deemed to be the [Customer's] authorized agent.

[32] Unlike non-switched circuits dedicated to a single customer's exclusive use between multiple premises of that customer, the WorldCom lines here involved for Peninsula's use were not routed to another Peninsula site but instead to the premises and switch facilities of WorldCom. Moreover, we note that WorldCom has distributed advertising material in which it indicates that it offers customers overseas private lines connected to the public switched network in the U.S. for the customers to use in placing long distance calls to various points throughout the world for which it will charge the customer on a usage basis (that is, per minute of call). See brochure entitled "WorldCom, The international telecommunications specialists" (copy included in File No. IC-92-05769).

makes WorldCom, when acting within the scope of that agency, a reseller of its own private lines. Since WorldCom has not obtained authority under Section 214 of the Act to provide international switched voice service through resale of international private lines between the Philippines and the U.S., we conclude that WorldCom also is acting in violation of Section 214.[33] Moreover, WorldCom knowingly so engaged, contrary to regulations in its tariff governing its offer of private line services."[34] In addition, WorldCom's failure to adhere to its own tariff constituted violations of Section 203(c) of the Act.[35] We expect WorldCom and Peninsula to come into compliance with the Communications Act and our policy and orders and prescribed tariff regulations forthwith.

14. Under Section 503 of the Communications Act, carriers that have violated the Act's provisions are subject to monetary forfeitures. We have adopted policy guidelines for assessing such forfeitures in particular cases.[36] Our *Policy Statement* suggests base forfeiture amounts for various generic violations, subject to certain upward and downward adjustment criteria.[37] In accordance with our *Policy Statement*, we treat statutory forfeitures prescribed in sections of the Act other than Section 503 as if they were a prescribed base amount, subject to the same downward adjustment criteria.[38] We cannot conclude on the basis of the record before us that any of the downward adjustment factors applies to the facts in this case.[39]

15. Based on the foregoing, it appears that WorldCom and Peninsula have been parties to willful and repeated violations of Section 214(a) by engaging in the resale of international private line service without the requisite certification required by each. Those violations, which took place at least as early as January 1992, have apparently continued to this date and were also egregious.[40] Accordingly, imposition of the following forfeitures appears warranted. WorldCom and Peninsula each are apparently liable under Section 503(b) and our *Policy Statement* for a base forfeiture of $80,000 for operating without authorization as required by Section 214(a).[41] We are making upward adjustments to $200,000 because the violations were egregious and are apparently continuing. Moreover, by extending to Peninsula and itself service in contravention of Section 1.01 of the Rules and Regulations of its Tariff F.C.C. No. 1 with respect to at least two calls on January 24, 1992, WorldCom also is apparently liable under Section 203(e) of the Act for an additional forfeiture of $6000.

V. CONCLUSION

16. We find that WorldCom and Peninsula have been engaged in the transmission of international calls from the Philippines to the United States through resale of an international private line, without authorization in contravention of Sections 214(a) of the Communications Act. In addition, WorldCom has violated Section 203(c) of the Act by extending service to Peninsula and itself in violation of its tariff. Accordingly, we are notifying WorldCom and Peninsula of their apparent liability for forfeitures totalling $206,000 and $200,000, respectively.

VI. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 203, 208, 214, 403 and 411(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 203, 208, 214, 403, 411(a), that the motion filed by World Communications, Inc. on June 2, 1992 to dismiss the above-captioned complaint IS DENIED.

18. IT IS FURTHER ORDERED, pursuant to Sections 503(b) of the Communications Act, 47 U.S.C. §§ 503(b), and Section 1.80 of the Commission's Rules and Regulations, 47 C.F.R. § 1.80, that World Communications, Inc. and the Manila Peninsula Hotel each ARE HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of $200,000 each for their willful and repeated violations of Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), by engaging in resale of international private lines for the provision of international switched voice service to guests of the Manila Peninsula Hotel without Section 214 authorizations.

---

[33] We note that we have granted WorldCom certification to provide switched voice services from the U.S. to the Philippines through resale of the switched services of AT&T, MCI Telecommunications Corporation and Sprint Communications, LP. *See* World Communications, Inc., 5 FCC Rcd 2101 (Com.Car.Bur. 1990). We also have granted WorldCom certification to provide switched voice service to the Philippines on a facilities basis (*see* World Communications, Inc., 5 FCC Rcd 5634 (Com.Car.Bur. 1990)), although, as WorldCom notes (Report at 3), it has not been able to get PLDT to agree to enter into an operating agreement with it. Notwithstanding said authorizations, as our *International Resale Order* makes clear, all carriers, even those that have previous facilities-based authority, must be separately certificated as a reseller of international private lines if they seek to provide such service. 7 FCC Rcd at 562, paragraph 24.

[34] *See* World Communications, Inc. Tariff F.C.C. No. 1 at Original Page 7 (effective Oct. 6, 1989) (Private Network Service furnished for private use of customer).

[35] Section 203(c) prohibits a carrier from extending to any person any privileges or facilities, in interstate and foreign wire or radio communication, except in accordance with its filed and published tariff regulations. By extending service to Peninsula and itself in knowing violation of its tariff, WorldCom violated Section 203(c). Section 203(e) specifies a forfeiture of $6,000 for each failure of a carrier to comply with the provisions of section 203 or of any FCC regulation or order thereunder and $300 for each and every day of the continuance of such offense.

[36] Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom.* U.S.T.A. v. FCC, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*).

[37] *Id.*, 7 FCC Rcd at 5339. The base forfeiture amount for each type of violation is a percentage of the statutory maximum for the service involved for each violation or each day of a continuing violation as set forth in Section 503(b). *Id.*

[38] *Id.*, 6 FCC Rcd at 4696.

[39] The downward adjustment criteria are: (1) minor violation, (2) good faith or voluntary disclosure, (3) history of overall compliance, and (4) inability to pay. *Id.*, 7 FCC Rcd at 5345. *See also* 47 C.F.R. § 503(b)(2)(D).

[40] WorldCom and Peninsula knew or should have known that, in light of our policy and orders, even if they had applied for Section 214 certification for one-way international resale from the Philippines, we would not have granted such applications in the absence of a showing that U.S. carriers would be afforded equivalent resale opportunities in the Philippines.

[41] *Policy Statement*, 7 FCC Rcd at 5342, 5345 (carrier liability for operation without authorization).

19. IT IS FURTHER ORDERED, pursuant to Section 203(e) of the Communications Act, 47 U.S.C. § 203(e), that Worldcom is apparently liable for forfeiture in the amount of $6,000 for violations of Section 203(c) of the Communications Act, 47 U.S.C. §203(c), by reselling its international private lines and by permitting its customer, Peninsula, to resell WorldCom's private lines in contravention of Section 1.01 of the Rules and Regulations in WorldCom's Tariff F.C.C. No. 1.

20. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules and Regulations, 47 C.F.R. § 1.80(f)(3), that World Communications, Inc. and the Manila Peninsula Hotel shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeitures ordered herein in the manner provided for in Section 1.80(h) of the Rules[42] or shall file a response showing why a forfeiture should not be imposed or should be reduced.[43]

21. IT IS FURTHER ORDERED that copies of this Notice of Apparent Liability for Forfeitures shall be sent by certified mail to respondent's counsel, Robert E. Conn, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, N.W., Washington, D.C. 20037, and to the Manila Peninsula Hotel, Corner of Makati and Ayala Avenues, Makati, Metro Manila, Philippines.[44]

22. IT IS FURTHER ORDERED that the above-captioned complaint IS GRANTED to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[42] The forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. Reference should be made on WorldCom's check or money order to "NAL/Acct. No. 216EI0001" and on Peninsula's check or money order to "NAL/Acct. No. 216EI0002." Such remittances should be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

[43] Any such response should refer to "File No. IC-92-05769" in addition to the appropriate NAL Account Number as indicated, *supra*, note 42.

[44] It does not appear that Peninsula has complied with its duty pursuant to Section 413 of the Act

> to designate in writing an agent in the District of Columbia, upon whom service of all notices and process and all orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding or suit pending before the Commission, and to file such designation in the office of the secretary of the Commission ....

We expect Peninsula to rectify this apparent oversight within thirty days of the release of this order or risk imposition of further sanctions.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 3, 1993

COMMENT FILING DATES ON NECA'S PROPOSED MODIFICATIONS TO AVERAGE SCHEDULE FORMULAS AND PROCEDURES

On December 31, 1992, the National Exchange Carrier Association, Inc. ("NECA") filed modifications to the interstate average schedules that NECA proposes become effective July 1, 1993.

NECA projects that the proposed modifications would, on average, result in total settlement increases in July 1993 of 2.95 percent over June 1993 levels (assuming constant demand in each of the two months). Specifically, NECA projects that average schedule companies, collectively, will receive a 2 percent increase in Common Line, and a 3.7 percent increase in Traffic Sensitive, settlements.

In addition, NECA proposes to incorporate Carrier Access Billing Systems ("CABS") revenue requirements into the common line and traffic sensitive central office formulas and eliminate the separate CABS revenue requirements formula.

Finally, NECA proposes to revise settlement procedures for the costs of handling 800 database queries. Separately, in a petition dated December 31, 1992, NECA requests authorization to implement those procedures on May 1, 1993.

Comments on NECA's proposed revisions to the average schedules may be filed on or before **February 12, 1993**. Reply comments may be filed on or before **February 26, 1993**. Commenting parties should file five (5) copies of their comments and reply comments with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of NECA's filings on the preceding matters may be obtained from the Commission's public records duplication contractor: ITS, Inc., Suite 140, 2100 M St., N.W., Washington, D.C. 20037. Telephone: (202) 857-3800. The record in this proceeding is also available for public inspection and duplication at Room 544, 1919 M Street, N.W., Washington, D.C.

For consideration in this proceeding, all filings should be captioned "In the Matter of National Exchange Carrier Association December 31, 1992 Proposed Revisions to the Average Schedule Formulas."

This proceeding is a non-restricted notice and comment proceeding. *Ex parte* presentations are permitted, provided they are disclosed as required in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216.

For further information, contact Kent R. Nilsson at (202) 632-1302.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION
d/b/a LCI INTERNATIONAL,
Complainant,

v.

CHILLICOTHE TELEPHONE COMPANY,
Defendant.

File No. E-92-129

ORDER

Adopted: January 26, 1993; Released: February 4, 1993

By the Chief, Formal Complainants and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On October 6, 1992, Litel Telecommunications Corp. (Litel) filed the above-captioned complaint against Chillicothe Telephone Company (Chillicothe) seeking damages resulting from Chillicothe's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On January 19, 1993, Litel and Chillicothe filed a joint motion to dismiss the complaint stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-318

In the Matter of

Amendment of Section 73.202(b),	RM-7853
Table of Allotments,	RM-7889
FM Broadcast Stations.	RM-7890
(Three Lakes, Newbold, Nakoosa and Port Edwards, Wisconsin)[1]	

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: January 19, 1993; Released: February 4, 1993

Comment Date: March 29, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 6515 (1991), proposing the allotment of Channel 229C2 to Three Lakes, Wisconsin. Three Lakes Broadcasting ("Three Lakes") filed comments and reply comments supporting the allotment at Three Lakes. Pacer Radio of Oneida ("Pacer Radio") and Berry Radio Company ("Berry Radio") filed separate counterproposals.[2] Informal comments were filed by Russell A. Cross and Free Air Waves.

2. The counterproposal filed by Pacer Radio requested the allotment of Channel 229C3 to Newbold, Wisconsin, as that community's first local service (RM-7889). Pacer Radio did not submit any information regarding Newbold's status as a community. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Hannibal, Oh*, 5 FCC Rcd 3315 (1990); and *Statenville, GA*, 5 FCC Rcd 2685 (1990). Although Newbold is attributed with a population of 2,281 persons in the 1990 U.S. Census, the Census listing is not absolute for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a post office, library, schools, shopping centers, churches, a newspaper, and social or civic organizations. We note that Newbold shares mail service with Rhinelander, Wisconsin (population 7,873). *See, e.g., Naples, FL*, 41 RR 2d 1549 (1977). Therefore, Pacer Radio is requested to submit information regarding Newbold to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with that community. This Request for Supplemental Information does not afford an opportunity to submit competing proposals. All comments must be filed in accordance with Section 1.52 and Section 1.402(b) of the Commission's Rules.

3. Interested parties may file comments on or before **March 29, 1993**. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the following:

Lyle R. Evans
Pacer Radio of Oneida
1296 Marian Lane
Green Bay, Wisconsin 54304

Susan Rester Miles
Hessian, McKasy & Soderberg
Professional Association
4700 IDS Center
Minneapolis, Minnesota 55402

Julie Ann Albrecht
Berry Radio Company
725 South Irwin Avenue
Green Bay, Wisconsin 54301

4. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] The communities of Newbold, Nekoosa and Port Edwards, Wisconsin, have been added to the caption.
[2] The counterproposals were placed on public notice on January 28, 1992 (Report No. 1872).

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-9

In the Matter of

Amendment of Section 73.202(b), RM-8152
Table of Allotments,
FM Broadcast Stations.
(Silver City, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 21, 1993; Released: February 4, 1993

Comment Date: March 29, 1993
Reply Comment Date: April 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Avila Beach, Ltd. ("petitioner"), requesting the substitution of Channel 225C2 for Channel 233A at Silver City, New Mexico, and the modification of Station KSCQ's license to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 225C2 for Channel 233A at Silver City since it could provide the community with its first local wide coverage area FM service and enable Station KSCQ to expand its service area. In accordance with Section 1.420(g) of the Commission's Rules, Station KSCQ's license may not be modified herein to specify non-adjacent Channel 225C2 if a competing expression of interest is received unless there is an additional equivalent class channel available for allotment. To this end, petitioner states that Channel 281C2 can be allotted if such interest is expressed.

3. Channel 225C2 can be allotted to Silver City in compliance with the Commission's minimum distance separation requirements at Station KSCQ's licensed transmitter site. Channel 281C2 can be allotted to Silver City without the imposition of a site restriction.[1] Mexican concurrence in these allotments is required since Silver City is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Silver City, New Mexico	233A	225C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 29, 1993**, and reply comments on or before **April 13, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Dominic Monahan, Esq.
Dow, Lohnes & Albertson
1255-23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] The coordinates for Channel 225C2 at Silver City are North Latitude 32-50-40 and West Longitude 108-14-18. The coordinates for Channel 281C2 at Silver City are North Latitude 32-46-23 and West Longitude 108-16-48.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-177

In the Matter of

Amendment of Section 73.202(b), RM-8043
Table of Allotments,
FM Broadcast Stations.
(Lamoni, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 21, 1993; Released: February 4, 1993

By the Chief, Allocations Branch;

1. At the request of Dwaine F. Meyer ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5475 (1992), proposing the substitution of Channel 250C3 for Channel 249A at Lamoni, Iowa, and the modification of Station KLAL's license to specify operation on the higher class channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 250C3 for Channel 249A at Lamoni since it would provide the community with its first wide coverage area FM service and enable Station KLAL to expand its service area. Channel 250C3 can be allotted to Lamoni in compliance with the Commission's minimum distance separation requirements at Station KLAL's presently licensed transmitter site.[1] As proposed, we will also modify Station KLAL's license to specify operation on Channel 250C3 in lieu of Channel 249A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lamoni, Iowa	250C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Dwaine F. Meyer for Station KLAL, Lamoni, Iowa, IS MODIFIED to specify operation on Channel 250C3, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Dwaine F. Meyer, licensee of Station KLAL, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 250C3 at Lamoni are North Latitude 40-37-00 and West Longitude 93-56-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Cargo Vessel NAL/Acct. No. 215HF0015
Kodiak Enterprise
Owned and Operated by
Kodiak Enterprise, Incorporated
Seattle, Washington

and her Masters

Jim Thill and James C. Cox

ORDER

Adopted: January 6, 1993; Released: January 26, 1993

By the Commission:

I. INTRODUCTION

1. These are Forfeiture Orders issued pursuant to Section 364 of the Communications Act of 1934, as amended, 47 U.S.C. § 362, to the owners and the masters of the Cargo Vessel Kodiak Enterprise. The vessel, Kodiak Enterprise, was navigated in the open sea on 31 days during the period February 20, 1991, to March 23, 1991, without an annual inspection by the Commission in violation of Section 362 of the Act. 47 U.S.C. § 360.

2. The master of the vessel from February 20, 1991, to 0500 hours on March 6, 1991, was Jim Thill. During that period the vessel navigated on the open sea on 15 days. The master of the vessel from 1330 hours on March 6, 1991, to March 23, 1991, was James C. Cox. During this time the vessel was navigated on the open sea on 16 days.

II. BACKGROUND

3. The Kodiak enterprise is a U.S. Cargo Vessel of 1,584 gross tons, call sign WAF5936, and is subject to the radiotelephone equipment provisions of the Communications Act. It must be inspected at least once each year by the Commission. 47 U.S.C. § 360(b). The vessel may not be navigated in the open sea without meeting the requirements of Title III, Part II of the Act. 47 U.S.C. § 351(a)(1).

4. The Commission adopted a Notice of Apparent Liability (NAL) on February 24, 1992, and released March 9, 1992, which found that the Kodiak Enterprise was in violation of Section 362 of the Act for 31 days (February 20 - March 14, and March 16 - March 23) and that the acts of the masters to leave port and remain in the open sea on those dates are willful acts. It proposed a forfeiture of $50,000 to the ship owner and $1,000 to each of the masters pursuant to Section 364 of the Communications Act, 47 U.S.C. §362.

5. The owner and masters replied on May 8, 1992. The reply states that "cancellation or reduction of the forfeiture is based on the following two criteria: (a) the Notice overstates the duration of the violation; and (b) significant mitigating factors are demonstrated." Criteria (a) refers to the requirement of the Rules that a forfeiture not be assessed for violations occurring more than one year prior to issuance of the NAL. It also raises the argument that the voyage to Seattle, where the ship was inspected, was not in violation of the statute. Criteria (b) addresses an alleged good faith effort to attain compliance and a history of compliance based upon other vessels owned and operated by the parent corporation.

III. DISCUSSION

6. Pursuant to Section 364(a) of the Act, 47 U.S.C. §362(a), the forfeiture amount for this violation by the ship owner is $5,000 per day, which may be mitigated as appropriate. See 47 U.S.C. §504(b). Section 1.80 of the Rules, however, specifies that a forfeiture not be imposed for violations occurring more than one year prior to issuance of the NAL. The NAL was adopted February 24, 1992, but was not released until March 9, 1992. The $50,000 forfeiture would be consistent with this requirement if there were at least 10 days of violation after March 9, 1991. There are 13 days of violation in this time frame. Accordingly, we conclude that the forfeiture is consistent with the statute of limitations.

7. The vessel owner argues that the seven days of the voyage from Dutch Harbor to Seattle during March 16 to March 23, 1991, should not be included as this "enabled the vessel to proceed coastwise to the nearest port at which an inspection could be readily obtained." We do not accept this argument. The vessel was long overdue for inspection when it left port on this voyage. It received no waiver from the Commission for this voyage as required by Section 362 of the Act. And we note that a coastwise voyage from Dutch Harbor to Seattle must necessarily pass the port of Anchorage, Alaska, where an inspection could have been obtained.

8. The vessel owner asserts that compliance by the parent corporation, Arctic Alaska Fisheries Corporation (Arctic Alaska), in obtaining inspections for its other vessels should be considered in mitigation of the forfeiture. Of the four vessels mentioned in the response as having successfully arranged for inspections, both the Northern Enterprise and the Western Enterprise had been under consideration for imposition of a forfeiture for violation of the inspection requirement due to the fact that after their inspection certification expired on December 22, 1990, and had been extended to March 1, 1991, an inspection was not performed until July 18, 1991. No forfeiture was proposed due the pendency of this forfeiture action. Accordingly, no mitigation based on overall compliance is appropriate.

9. The vessel owner also asserts the good faith effort to obtain an inspection as a mitigating factor. It states that the vessel would have been inspected on February 21, 1991, but for an error by Seattle-based operations personnel. In light of the overall facts of this case, however, we cannot conclude that the owner has demonstrated a good faith effort to comply.

10. Section 364(b) of the Act, 47 U.S.C. §362(b), specifies a forfeiture amount of $1,000 (which also can be mitigated) for the master of a vessel in violation, regardless of the duration of the violation. Jim Thill ceased to be master of the Kodiak Enterprise prior to March 9, 1991, accordingly, we cancel his forfeiture as outside the statute of limitations. James C. Cox left port on March 6, 1991,

and again on March 16, 1991, and navigated outside of port on the days at issue here after March 9, 1991. In the absence of mitigating factors for him, we affirm the $1,000 forfeiture.

IV. CONCLUSION

11. The vessel was navigated in the open sea on the dates in question. For the master, James C. Cox, there appears to be no basis for mitigation or adjustment, so we are assessing a forfeiture for $1,000. As the violation of Jim Thill occurred more than one year prior to the release of the NAL, we are canceling the forfeiture to him. For the ship owner, the statutory forfeiture amount is $5,000 per day. We are not persuaded by the arguments made for mitigation and in light of the fact that the forfeiture amount in the NAL of $50,000 is less than that which could be imposed under the Act, we decline to mitigate it further.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 364(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 362(a), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the vessel Kodiak Enterprise IS LIABLE FOR A MONETARY FORFEITURE in the amount of $50,000 for navigation in the open sea from March 10, 1991, to March 14, 1991, and from March 16, 1991, to March 23, 1991, without having an annual inspection as required by Section 362(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 360(b).

13. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the forfeiture assessed to the master of the vessel Kodiak Enterprise from February 21 to March 6, 1991, Jim Thill, IS CANCELED.

14. IT IS FURTHER ORDERED, pursuant to Section 364(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 362(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the master of the vessel Kodiak Enterprise from March 6, 1991, to March 23, 1991, James C. Cox, IS LIABLE FOR A MONETARY FORFEITURE in the amount of $1,000 for navigation in the open sea from March 10, 1991, to March 14, 1991, and from March 16, 1991, to March 23, 1991, without having an annual inspection in willful violation of Section 362(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 360(b).

15. IT IS FURTHER ORDERED, that payment shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No.: 215HF0015" and mailed to the following address:

Federal Communications Commission
P. O. Box 73482
Chicago, Illinois 60673-7482

16. IT IS FURTHER ORDERED that the Secretary shall send by certified mail a copy of these Forfeiture Orders to each of Kodiak Enterprise, Inc.; Jim Thill; and James C. Cox at Fishermen's Center, Fishermen's Terminal, P.O. Box 79021, Seattle, Washington 98119.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-10

In the Matter of

Amendment of Section 73.202(b), RM-8150
Table of Allotments,
FM Broadcast Stations.
(Paris, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 21, 1993; Released: February 4, 1993

Comment Date: March 29, 1993
Reply Comment Date: April 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Benton-Weatherford Broadcasting, Inc. of Tennessee ("petitioner"), permittee of Station WMUF-FM, Channel 231A, Paris, Tennessee, requesting the substitution of Channel 231C3 for Channel 231A at Paris and modification of petitioner's construction permit for Station WMUF-FM to specify operation on the higher powered channel.[1] Petitioner states that it will apply for Channel 231C3, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 231C3 for Channel 231A at Paris, since it could provide the community with a wide coverage area FM service. Channel 231C3 can be allotted to Paris in compliance with the Commission's minimum distance separation requirements with a site restriction 17.2 kilometers (10.7 miles) northeast to accommodate petitioner's desired site.[2] This proposal is contingent upon Station WIST-FM at Lobelville, Tennessee, receiving a license to operate on Channel 233C2 in accordance with its outstanding construction permit (BMPH-920325IC). Therefore, we shall not finalize this proceeding until the Lobeville station is licensed accordingly.

3. As requested, we shall propose to modify the construction permit of Station WMUF-FM at Paris, Tennessee, to specify operation on Channel 231C3 in lieu of Channel 231A in accordance with Section 1.420(g) of the Commission's Rules. We shall not accept competing expressions of interest or require the petitioner demonstrate the availability of an additional equivalent channel at Paris.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Paris, Tennessee	231A, 288A	231C3, 288A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 29, 1993**, and reply comments on or before **April 13, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary D. Benton
Benton-Weatherford Broadcasting, Inc. of Tennessee
P.O. Box 1239
Paris, Tennessee 38242
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 231C3 at Paris are North Latitude 36-22-40 and West Longitude 88-09-20.

evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-11

In the Matter of

Amendment of Section 73.202(b) RM-8164
Table of Allotments,
FM Broadcast Stations.
(Spokane, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 21, 1993; Released: February 4, 1993

Comment Date: March 29, 1993
Reply Comment Date: April 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Melinda Boucher Read ("petitioner"), permittee of Station KSPO(FM), Spokane, Washington, proposing the substitution of Channel 245C3 for Channel 245A at Spokane and the modification of her construction permit to specify operation on the higher powered channel. Petitioner states that she will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 245C3 for Channel 245A at Spokane, Washington, since it could provide the community with a wide coverage area FM service. Our review of petitioner's proposal confirms that Channel 245C3 can be allotted to Spokane in compliance with the Commission's minimum distance separation requirements for domestic allotments at petitioner's specified site.[1] However, our engineering analysis also reveals that the proposed allotment would be short-spaced to vacant Channel 245A, Salmo, British Columbia. Therefore, we have sought Canadian concurrence in the allotment of Channel 245C3 at Spokane as a specially negotiated allotment since Spokane is located within 320 kilometers (200 miles) of the U.S.-Canadian border. As requested, we also propose to modify petitioner's construction permit for Station KSPO(FM) to specify operation on Channel 245C3 at Spokane. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 245C3 at Spokane or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Spokane, Washington	225C, 229C, 245A, 251C, 255C, 260C, 280C2, 284A, 289C, 300C	225C, 229C, 245C3, 251C, 255C, 260C, 280C2, 284A, 289C, 300C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 29, 1993**, and reply comments on or before **April 13, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ellen S. Mandell
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] The coordinates for Channel 245C3 at Spokane are North Latitude 47-41-39 and West Longitude 117-20-03.

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-173

In the Matter of

Amendment of Section 73.202(b), RM-8033
Table of Allotments,
FM Broadcast Stations.
(Lakewood, New York, and Clarendon, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 21, 1993; Released: February 5, 1993

By the Chief, Allocations Branch:

1. At the request of Robert Stevens ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5233 (1992), proposing the allotment of Channel 295B1 to Lakewood, New York, as the community's first local FM service. To accommodate the allotment at Lakewood, the *Notice* also proposed the substitution of Channel 282A for unoccupied but applied for Channel 295A at Clarendon, Pennsylvania.[1] Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 295B1 to Lakewood since it could provide the community with its first local aural transmission service. Channel 295B1 can be allotted to Lakewood with a site restriction of 10.1 kilometers (6.3 miles) south to avoid short-spacings to Stations WCTL, Channel 292A, Union City, Pennsylvania, and CILQ-FM, Channel 296C1, Toronto, Ontario, Canada. Channel 282A can be allotted to Clarendon in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.6 miles) west to avoid a short-spacing to Station WLMI, Channel 280A, Kane, Pennsylvania.[2] Canadian concurrence in the allotments at both Lakewood and Clarendon have been received since both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. The Simpsons are not entitled to reimbursement for the costs associated with changing channels because they are applicants and not permittees or licensees. However, they will be permitted to amend their application to specify Channel 282A at Clarendon without loss of cut-off protection.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lakewood, New York	295B1
Clarendon, Pennsylvania	282A

5. The window period for filing applications for Channel 295B1 at Lakewood, New York, will open on **March 23, 1993**, and close on **April 22, 1993**.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by REGISTERED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 295A at Clarendon, Pennsylvania, as follows: Cary H. and Betty F. Simpson, P.O. Box 247, Tyrone, Pennsylvania 16686.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] On March 6, 1992, Cary H. and Betty F. Simpson ("Simpsons") filed an application for Channel 295A at Clarendon (BPH-920306MA). A copy of the *Notice* was sent to the applicants.

[2] The coordinates for Channel 295B1 at Lakewood are North Latitude 42-00-54 and West Longitude 79-17-38. The coordinates for Channel 282A at Clarendon are 41-47-21; 79-08-29. We note that Channel 282A can also be used at the site specified in the Simpsons' pending application for Channel 295A at Clarendon, which are 41-48-50; 79-10-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 27, 1993

NEW APPLICATION PROCESSING PRACTICES IN THE COMMON CARRIER POINT-TO-POINT MICROWAVE AND BROADCAST AUXILIARY SERVICES

Effective October 1, 1992, processing of applications in the Common Carrier Point-to-Point Microwave and Broadcast Auxiliary Services was transferred to the Private Radio Bureau's Licensing Division in Gettysburg, Pennsylvania. In order to provide better service to the public, the Licensing Division has instituted several changes in processing procedures, along with reinstituting certain Commission policies for the filing of applications. While these changes may require some adjustment, we hope you find that they will ultimately improve the speed and quality of processing in the transferred services.

All applications and requests to the Commission must be submitted with an original signature as specified in the Commission's rules. Applications and related statements of fact may not be signed by attorneys, consultants or other third parties except as specifically permitted in the rules. Previously the Common Carrier Bureau had an informal policy of allowing attorneys to sign certain applications, primarily those requesting Special Temporary Authority. While similar measures may be considered by the Private Radio Bureau in the future, we must follow current Commission rules and require a signature from the applicant. An applicant's signature is required for the Anti-Drug Abuse Act certification, so obtaining an applicant's signature for the application itself should not present an undue burden.

All requests for Special Temporary Authority should be submitted in writing with the proper fee. In emergency situations, STA requests may be submitted by telephone, telegram, FAX or mail. Applicants will be billed for the fee. For more information on the emergency STA procedure, contact the Consumer Assistance Branch at (717) 337-1212 or consult the Private Radio Services Fee Filing Guide.

Applications in the transferred services will normally be processed in order of receipt date. Written authorizations will be issued shortly after grants are made. We will continue to issue weekly public notices for the Common Carrier Point-to-Point Microwave service listing applications received and actions taken. The public notice will be issued each Wednesday unless it is a federal holiday. In that event, the notice will be issued the following business day. Please note that the appearance of these applications on public notice as required by the Communications Act does not constitute authority to construct or operate.

In order to concentrate our efforts on processing, the Commission will no longer issue listings of Broadcast Auxiliary applications accepted for filing. We regret having to eliminate this list, but we must devote our limited resources to processing applications and fulfilling requirements of the Communications Act and the FCC Rules. Applications accepted for filing will be available in the Gettysburg Public Reference Room for three days after receipt. As a courtesy to the public, we will issue each Friday an informational list of Aural and TV Broadcast Auxiliary actions taken on pending applications. If a holiday falls on Friday, the list will be issued the following business day. Copies of authorizations for Remote Pickup and Low Power Auxiliary will be available in the Gettysburg Public Reference Room after grant.

For transfers of control and assignments of multiple authorizations in the Common Carrier Point-to-Point Microwave Service, applicants need only file an original and one copy of the application covering all stations in the transaction. You need not file an application for each station involved. Requests for extension of the consummation deadline for transfers of control and assignments of authorizations will receive a letter indicating whether the request has been granted or denied.

In order to reduce processing time, we will no longer provide courtesy copies of authorizations in the transferred services. We also will no longer stamp the FCC seal on Common Carrier Point-to-Point Microwave authorizations.

Applications in the Common Carrier 28 GHz band continue to be processed by the Common Carrier Bureau in Washington and have not been transferred to Gettysburg. In addition, applications for Multichannel Multipoint Distribution Service have been returned to Washington and will be processed by the Common Carrier Bureau. For information or status checks on these applications, contact the Domestic Radio Branch at (202) 634-1706.

We seek your suggestions on ways to further enhance our processing procedures for the transferred services. Please direct your correspondence to Walt Boswell, Special Assistant, Licensing Division, Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325.

Station files for all transferred services are available from the Consumer Assistance Branch in Gettysburg. For further information regarding these issues, or to check the status of applications or requests in the transferred services, please contact the Consumer Assistance Branch at (717) 337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section
1.2002 of the
Commission's Rules

ORDER

Adopted: January 13, 1993; Released: February 5, 1993

By the Commission:

1. By this *Order* we amend subsection 1.2002(c) of our rules. This section implements section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

2. Section 5301 of the Anti-Drug Abuse Act of 1988 gives federal and state court judges the discretion to deny federal benefits to individuals convicted of offenses consisting of the distribution or possession of controlled substances. Under section 1.2002 of the Commission's Rules, 47 C.F.R. § 1.2002, an applicant for any new, modified, and or renewed instrument of authorization from the Commission must, in order to be eligible, certify that neither the applicant nor any party to the application is subject to a section 5301 denial of benefits.

3. By its terms, the only licenses section 5301 applies to are "professional" and "commercial" licenses. 21 U.S.C. § 862 (d)(1)(A). Instruments of authorization obtained from the Commission by federal, state or local governmental entities or subdivisions thereof are not used for professional or commercial purposes and, therefore, these entities should be exempt from the certification requirements of our rules.

4. Because this rule change simply conforms our rules to the statute, and is a minor and non-controversial amendment in which the public is not likely to be interested, we find for good cause that compliance with the notice and comment provisions of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. § 553(b)(B). For similar reasons, and because the amendment relieves a restriction, compliance with the effective date provision of the Administrative Procedure Act also is unnecessary. 5 U.S.C. § 553(d).

5. Accordingly, pursuant to sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r), and the Anti-Drug Abuse Act of 1988, as amended, 21 U.S.C. §862, IT IS ORDERED that section 1.2002(c) of the Commission's Rules, 47 C.F.R. § 1.2002(c) is AMENDED as set forth in the Appendix, EFFECTIVE upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 1, is amended to read as follows:

I. Part 1 - Practice and Procedure.

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Paragraph (c) of section 1.2002 is revised to read as follows:

§ 1.2002 Applicants required to submit information.

*****

(c) The provisions of paragraphs (a) and (b) of this section are not applicable to the Amateur Radio Service, the Citizens Band Radio Service, the Radio Control Radio Service, to users in the Public Mobile Services and the Private Radio Services that are not individually licensed by the Commission, or to federal, state or local governmental entities or subdivisions thereof.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 14, 1993

Released: February 5, 1993

CERTIFIED MAIL NO. P 295 670 721
RETURN RECEIPT REQUESTED
Richard Hildreth, Esq.
Fletcher, Heald & Hildreth
Attorneys at Law
Suite 400
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036-2679

Mail Stop 1500E3

Re: Notice of Forfeiture
issued to Pegasus
Broadcasting of San
Juan, Inc. (Station
WAPA-TV) on
October 18, 1991.
3153204-91024

Dear Mr. Hildreth:

This is in response to your Supplement to Request for Reconsideration dated January 6, 1992. You requested reconsideration of a $10,000 monetary forfeiture penalty that had been assessed against Pegasus Broadcasting of San Juan, inc., licensee of station WAPA-TV.

We are treating your request as a Petition for Reconsideration under Section 1.106 of the Federal Communications Commission's (FCC) rules. 47 C.F.R. Section 1.106. As explained below, the monetary forfeiture penalty is reduced to $4,000, and this penalty is affirmed.

Our records show that on August 12, 1991, two FCC inspectors visited the antenna tower structure at Cerro La Santa, Puerto Rico, coordinates N18-06-42 W066-03-05, used by TV broadcast station WAPA. The FCC inspectors observed that the top beacon was not functioning properly in that this beacon was burning steadily instead of flashing. The FCC inspectors checked WAPA's log which reflected that an employee had observed the malfunctioning top beacon on August 10. It was also determined that the Federal Aviation Administration (FAA) had not been notified of the malfunctioning beacon.

The FCC inspectors also observed the paint on the tower from a distance of one quarter mile. When the tower was viewed from the direction that the sun was shining on the tower, the tower and its white and orange painted bands were visible. However, when the tower was viewed from other angles, the visibility of the tower and the painted bands on the tower were impaired. The white and orange painted bands on the tower appeared dirty, opaque and not distinguishable from a distance of one quarter mile.

The FCC inspectors then went to the base of the tower and compared the paint on the tower with the FAA "In-Service Aviation Orange Color Tolerance Chart." The chart provides a range of colors or colors of different shades to indicate whether the paint on a tower adequately warns aircraft of the tower structure. FAA circulars explain that this chart is used to "determine when the paint has faded beyond acceptable limits, and when repainting is required." Obstruction Marking and Lighting, FAA Advisory Circular 70/7460-1G at 38, para. 32f (1985); and 70/7460-1H at 31, para. 134(1991). [Hereinafter cited as *FAA Circulars*]. These *FAA Circulars* are referred to by several FAA rules. 14 C.F.R. Section 77.11(b) and 77.19(b). The FCC inspectors found that compared to the colors on the chart, the color of the paint on the tower as it appeared when they arrived at the tower was unacceptable. The FCC inspectors then attempted to clean a portion of the base of the tower with a cloth, and again compared the chart to the paint on the tower. The color of the paint on the tower was still unacceptable.

In the judgement of the FCC's inspectors, the problem with the appearance of the paint on the tower is caused by constant humidity which coats the tower with water. This water then develops into mildew. In addition, dirt and dust attach to the water and mildew. The impairment of the paint on the tower results from the cumulative effect of the build-up of the water, mildew, dirt and dust on the tower.

The Engineer-in-Charge of the FCC's San Juan, Puerto Rico Office subsequently visited the tower on or about September 18, 1991, and concurred with the FCC inspectors' assessment of the paint on the tower.

On September 11, 1991, the FCC's San Juan Office issued Pegasus Broadcasting a Notice of Apparent Liability for a $10,000 monetary forfeiture penalty for willfully violating Sections 17.31(a)(1), 17.48 and 17.50 of the FCC's rules. Section 17.31(a)(1) requires that beacons at the top of towers flash. 47 C.F.R. Section 17.31(a)(1). Section 17.48 requires FCC licensees to notify the FAA if tower lights malfunction. 47 C.F.R. Section 17.48. Section 17.50 directs that "All towers shall be cleaned or repainted as often as necessary to maintain good visibility." 47 C.F.R. Section 17.50. Furthermore, Section 17.21 of the FCC's rules requires towers over 200 feet in height to be painted. 47 C.F.R. Section 17.21. Sections 17.22 and 17.23 specify how towers should be painted. 47 C.F.R. Sections 17.22 and 17.23. The Notice of Apparent Liability stated that the "forfeiture would originally have been for $20,000, however, using the FCC Policy Statement adopted on July 11, 1991 and taking into consideration your history of overall compliance, we have arrived at the ...[$10,000] figure."

Pegasus Broadcasting responded to the Notice of Apparent Liability on October 10, 1991. The FCC's San Juan Office issued Pegasus Broadcasting a Notice of Forfeiture for a $10,000 monetary forfeiture penalty on October 18, 1991. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

On October 18, 1991, Pegasus Broadcasting requested a meeting with the Chief of the FCC's Field Operations Bureau, and this meeting was held on December 12, 1991. Also, on November 22, 1991, Pegasus Broadcasting wrote the FCC admitting that the top beacon was not flashing.

The $10,000 monetary forfeiture penalty imposed on Pegasus Broadcasting in the Notice of Forfeiture is reduced to $4,000. As stated in the Notice of Apparent Liability, the

FCC's San Juan Office intended to reduce by 50 percent the base amount authorized as a monetary forfeiture penalty for tower violations because of lack of evidence concerning past noncompliance with the FCC's rules. The FCC's *Policy Statement* adopted on July 11, 1991, provided a base amount of $20,000 for tower violations by broadcast stations. *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991). [Hereinafter cited as *Policy Statement*]. Thus, the FCC's San Juan Office reduced the monetary forfeiture penalty to $10,000.

The FCC, however, recently reconsidered its *Policy Statement* and decided to have $8,000 as the base amount for monetary forfeitures for tower violations committed by all types of licensees. *Policy Statement, modified in part on reconsideration*, FCC 92-212 (May 14, 1992). [Hereinafter cited as *Modified Policy Statement*]. Therefore, $8,000 is the base amount for Pegasus Broadcasting's violations. Since the FCC's San Juan Office intended to reduce the base amount by 50 percent, a $4,000 monetary forfeiture penalty is appropriate.

Pegasus Broadcasting in its January 6, 1992, letter which it refers to as a Supplement to Request for Reconsideration, presents a number of reasons why a monetary forfeiture penalty should not be imposed. First, Pegasus Broadcasting argues that the paint on the tower was adequate because the tower had been repainted less than a year before the FCC's inspection. The FCC's rules do not specify how frequently towers must be painted, but instead provide that towers must "be cleaned or repainted as often as necessary to maintain good visibility." 47 C.F.R. Section 17.50. Therefore, a tower could be recently painted and still violate this rule. The *FAA Circulars* state "While it is not practical to give a maintenance schedule for all climates, surfaces should be repainted when the color changes noticeably or its effectiveness reduced... . Tolerance charts are available for determining when repainting is required." *FAA Circulars*, at 5, para. 9 (1985); and at 5, para. 32 (1991).

Second, Pegasus Broadcasting claims that the condition of the tower results from an act of God. "Dust from the Sahara Desert is occasionally...deposited on the peak by trade winds, and if the humidity is high enough, the dust will temporarily stick to the tower." This dust, moreover, it is claimed "is washed off the towers by rain storms." As previously explained, the condition of the paint on the towers is the cumulative effect of a number of factors, and attempting to clean the tower does not remedy the problem. Rain also does not remedy the problem since it rains almost every day at the tower's location. Wind and lightning damage to towers may also be considered acts of God, and this type of damage may result in a tower violating the FCC's tower rules.

Third, it is argued by Pegasus Broadcasting that "In view of the vague and subjective standard set forth in Section 17.50 for determining when a tower needs painting, it is unfair to hold licensees to the extremely precise standard of the elusive Tolerance Chart, which is not even available from the FCC or the FAA." By any reasonable standard, the tower was not painted "to maintain good visibility" as required by Section 17.50 of the FCC's rules. 47 C.F.R. Section 17.50. *See also* 47 C.F.R. Section 17.23 (specifies how towers should be painted). Furthermore, as previously explained, the *FAA Circulars* make it clear that the color tolerance chart is used to "determine...when repainting is required." The *FAA Circulars* further state how the chart may be obtained. *FAA Circulars*, at 38, para. 32 f (1985); and at 31-32 (1991). These *FAA Circulars* are referred to by several FAA rules. 14 C.F.R. Section 77.11 (b) and 77.19(b).

The *FAA Circulars* also indicate the distance at which it is necessary for aircraft to observe a tower to safely avoid the structure. The visibility of a tower should allow an aircraft to remain at least 2,000 feet from the structure. *FAA Circulars* at iii, para. 4; *see also* p.v, para. 7 (1985); and at 53 (1991). If an aircraft is traveling at 190 m.p.h., for example, it needs 1.18 statute miles for the pilot to see, recognize the tower, and initiate evasive action to avoid the tower by 2,000 feet. *FAA Circular*, at iv, para. 5 (1985). The FCC's San Juan Office observed that the paint on WAPA's tower provided poor visibility at a distance of one quarter mile, or 1,320 feet. This is well within the guidance provided by the *FAA Circular* which states that towers should be visible from a distance of 1.18 miles, or about 6,300 feet, by an aircraft moving at 190 m.p.h. so that the aircraft may safely avoid the tower by 2,000 feet.

Fourth, Pegasus objects that the FCC should not require it to comply "with the FAA bulletin which had only been in effect for 11 days prior to the inspection." However, the 1991 *FAA Circular* was preceded by an FAA Circular issued in 1985. The 1985 *FAA Circular* is almost identical to the 1991 *FAA Circular* concerning the painting of towers.

Fifth, Pegasus claims that the painting violation was neither willful nor repeated as required by The Communications Act of 1934, 47 U.S.C. Section 503(b). The violation was repeated since the poor visibility of the tower was observed by FCC inspectors on two different days. A repeated violation is defined by the Communications Act as "the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. Section 312(f)(2). Since Section 503(b)(1)(B) of the Communications Act authorizes forfeiture penalties for willful or repeated violations, if violations are repeated, it is not necessary to reach the question as to whether they were willful. *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984).

Although neither the FCC's Notice of Apparent Liability nor the Notice of Forfeiture cited Pegasus Broadcasting for a repeated violation, this does not prevent the FCC from imposing a monetary forfeiture penalty for a repeated violation. Pegasus itself raised the issue regarding whether the violation was repeated, and the Commission has held that it is not necessary to specify a repeated violation when imposing a forfeiture penalty for a repeated violation. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR2 989 (1991).

Furthermore, since the FCC's Notice of Apparent Liability and Notice of Forfeiture charge a willful violation, this will be addressed although, as stated above, once it has been determined that a violation was repeated, it is not necessary to determine whether it was willful. The condition of the paint on the tower reflected a willful omission or laxity. Although the tower had been painted about a year before the FCC's inspection, the unsatisfactory condition of the paint on the tower indicated, as possible causes of the problem, a poor painting of the tower; a steady deterioration of the paint because of the cumulative effect of climatic factors; or a combination of these causes. The condition of the tower did not develop overnight, and a reasonable monitoring of the tower should have disclosed the problem. The FCC's rules require daily monitoring of

the tower's lights, and the cleaning and repainting of the tower "as often as necessary to maintain good visibility." 47 C.F.R. Section 17.47 and 17.50.

Section 312(f)(1) of the Communications Act of 1934 defines willful as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule...of the Commission." 47 U.S.C. Section 312(f)(1). Willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question as opposed to being accidental such as brushing against a radio power switch and turning on the radio. To establish a willful violation, moreover, it is not necessary to show that a person knew he was acting wrongfully. In addition, the Commission has stated that "the policy factor which has been the main key to our actions in this area is a demonstrated lack of concern or indifference on the part of the licensee for compliance with the Act or our Rules.... The circumstances clearly indicate that the violations occurred because of the licensee's laxity. The violations could, and indeed should, have been easily avoided.... If a licensee shows a lack of concern for operating its station in a manner which will meet...[FCC] standards, resulting violations will be dealt with..." by the FCC. *Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141-42 (1963).

Sixth, Pegasus Broadcasting argues that the $10,000 monetary forfeiture penalty that the FCC's San Juan Office imposed for the violations "is arbitrary and capricious," is too high when compared to "past enforcement activities" and the guidance provided in the FCC's Policy Statement. As previously explained, the $10,000 forfeiture is reduced to $4,000.

Both of these amounts, however, are authorized by Section 503(b)(2) of the Communications Act. 47 U.S.C. Section 503(b)(2). The $10,000 penalty, moreover, was authorized by the FCC's 1991 *Policy Statement*, and the $4,000 penalty is authorized by the *Modified Policy Statement* issued in 1992. Furthermore, since the FCC only recently increased the value of its monetary forfeiture penalties as reflected in the *Policy Statement*, penalties imposed for tower violations before this increase were substantially lower. Also, the FCC has considerable discretion regarding the size of the forfeiture penalty that it assesses in individual cases. The Commission is not required to resolve a case in the same manner as past cases that appear comparable. *Triple X Broadcasting*, 46 RR2d 788, 789-90 (1979). *See also Policy Statement*, 6 FCC Rcd at 4695; 69 RR2d at 832.

Pegasus claims that the monetary forfeiture penalty should be substantially reduced or eliminated based on the "Downward Adjustment Criteria" in the *Policy Statement*. Pegasus claims a 50 percent reduction based on its history of past compliance. The FCC's San Juan Office allowed this reduction. Pegasus also claims a reduction for a "good faith" attempt to properly maintain the tower. Although the *Policy Statement* provides that "Good faith or voluntary disclosure" is a downward adjustment criteria, this usually applies to the type of situation where a person voluntary requests FCC assistance and while providing this assistance, the FCC discovers rule violations. The potential application of this downward adjustment criteria, therefore, is rather narrow, and does not apply to Pegasus's situation. Pegasus further claims a reduction arguing that the violations are minor. The poor visibility of the paint on the tower is a serious violation. Likewise, a non-flashing, steadily burning tower light is a serious violation since the various FCC rules relating to beacons require them to flash to enhance their warning ability. *See, e.g.*, 47 C.F.R. Section 17.31(a)(1).

Seventh, Pegasus Broadcasting states that it should have been notified of the FCC's enforcement policy, and warned of the possible violations before a penalty was imposed. The FCC is not required to notify licensees in advance concerning its enforcement policies. *High Country Broadcasting Corporation*, 4 FCC Rcd 1528; 65 RR2d 1618 (1988). Likewise, the FCC is not required to warn a licensee before assessing a monetary forfeiture penalty. *Review of Liability of MTD*, 6 FCC Rcd at 34, 68 RR2d at 990-91. *See also* 47 U.S.C. Section 503(b)(5)(requires FCC to warn people that do no hold an FCC license before imposing forfeiture penalties).

Eighth, Pegasus Broadcasting claims that the FCC's Notice of Apparent Liability and "Forfeiture Order fail to clearly articulate the reasons for imposition of the forfeiture" and "did not indicate how the $10,000 forfeiture amount had been allocated among the alleged violations." The correspondence from the FCC's San Juan Office was very clear that Sections 17.31(a)(1), 17.48 and 17.50 of the FCC's rules had been violated because the top beacon on the tower was not flashing, the FAA had not been notified of the improper functioning of the beacon, and the paint on the tower did not provide good visibility. Regarding the paint, the FCC's correspondence explained "that the paint was opaque and the bands [alternating bands of aviation orange and white paint] were not clearly distinguishable at a distance." The correspondence further explained that the "paint must comply with the In Service Aviation Orange Color Tolerance Chart as contained in FAA a/c 70/7460-1H, Obstruction Marking and Lighting." The Notice of Forfeiture stated that the poor condition of the paint was caused by dust that "adheres to the structure and by accumulation dulls the paint. Other environmental factors such as mildew and fungus...also quickly dull and deteriorate the tower structure painting." This clearly articulates the reasons for the monetary forfeiture penalty.

The FCC, moreover, in forfeiture proceedings is not required to delineate the monetary liability attributable to each of several rule violations. *Niagara Frontier Broadcasting Corp.*, 33 RR2d 1351, 1356 (1975). Although the purpose of the *Policy Statement* is to "establish standards for assessing forfeitures," including specified forfeiture values for specific types of violations, the FCC made it clear that "we remain 'free to exercise...discretion in situations that arise' in specific cases." 6 FCC Rcd at 4695, 66 RR2d at 823. The FCC also explained that the *Policy Statement* is only a general statement of policy, and is not "a binding rule." *Modified Policy Statement*, at para. 4.

Finally, Pegasus objects that the FCC's Notice of Forfeiture "was based, at least in part, by comparing a photograph with the elusive color chart. Not only is this impossible, it is not even known which photograph is referred to." Pegasus itself provided these photographs as part of its response on October 10, 1991, to the FCC's Notice of Apparent Liability. The FCC's Notice of Forfeiture was not based on these photographs. Instead, it was based on the personal observations of the tower during two days by two FCC inspectors and the Engineer-in-Charge of the FCC's San Juan Office. In response to the photographs provided by Pegasus, however, the Notice of Forfeiture merely mentioned that the painting of the tower as reflected in the "photographs (close up)...specifically those

taken on September 27, 1991" did not match the standards provided in the FAA's "In Service Aviation Orange Color Tolerance Chart."

Please request your client to submit the $4,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 3153204-91024 should be placed on the check. The check for $4,000 should be mailed to:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. Section 504(a).

Please also advise your client to promptly correct the tower violations if this has not already been done. *See Radio Relay Corp.-Michigan*, 5 FCC Rcd 5900 (Mobile Services Division 1990).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cascade Utilities, Inc.

American Telephone and Telegraph,
Company Petition for Declaratory
Ruling

MEMORANDUM OPINION AND ORDER

Adopted: January 21, 1993; Released: February 5, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The American Telephone and Telegraph Company (AT&T) petitions the Commission to declare unlawful the refusal of Cascade Utilities, Inc. (Cascade), a local exchange carrier (LEC), to route directly to AT&T all "O+" interLATA traffic originating in Cascade's service area.[1] Cascade and Sierra Telephone Company (Sierra) filed comments and six parties filed reply comments.[2] For the reasons set forth below, we deny AT&T's petition.

II. BACKGROUND

2. Cascade has not converted to equal access. Thus, unlike networks in equal access areas and non-equal access areas with more sophisticated systems, Cascade's network routes "O+," as well as "O-," calls to operators who must query the caller to determine the nature of each call. These operators then connect "O+" interLATA calls to AT&T as Cascade's Feature Group C customer. After AT&T ceased compensating Cascade for these operator services in 1991, Cascade unsuccessfully petitioned for a waiver of the Commission's Rules that would have enabled Cascade to recover the costs of these services from AT&T and other interexchange carriers.[3]

III. PLEADINGS

A. AT&T Petition

3. AT&T contends that Cascade refuses to comply with AT&T requests to cease providing operator assistance on "O+" interLATA calls currently transferred to AT&T and, instead, to route such calls directly to AT&T. AT&T Petition at 1-3. It asserts that Cascade's refusal represents an unreasonable practice in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), in that Cascades's diversion of these calls to its own operators impairs the premium access traditionally provided to AT&T and protected under the Commission's *Puerto Rico Order*.[4] AT&T also claims that, as Cascade's Feature Group C customer, AT&T is entitled, under the NECA tariff, to all interstate interLATA calls placed using the "O+" dialing format.[5] AT&T argues that the "diversion" of "O+" interLATA traffic to Cascade's own facilities denies AT&T its right under that tariff to receive that traffic directly. As such, AT&T claims Cascade fails to provide service in accordance with its tariff and thereby violates Section 203, 47 U.S.C. 203, of the Act. *Id.* at 7.

4. AT&T next maintains that Cascade's handling of "O+" interLATA calls prevents AT&T from performing these operator services itself contrary to Commission policy with regard to such "internal" functions. AT&T also asserts that Cascade's refusal to route such calls to AT&T violates the legal principle that a business may choose to supply itself rather than use an outside supplier. *Id.* at 4-5. AT&T adds that the inclusion of a termination clause in its earlier operator services contract with Cascade supports AT&T's claim that it has the power to "reclaim" this traffic from Cascade. *Id.* at 3.

5. In addition, AT&T asserts that Cascade's handling of "O+" interLATA calls threatens the public interest because it deprives customers of automated card calling and other advanced services which Cascade's operators do not currently provide. AT&T also contends that AT&T's handling of operator assistance on such calls will enable it to achieve greater economies. *Id.* at 2-3.

B. Comments

6. Commenting parties disagree whether it is technically feasible for Cascade to route "O+" interLATA traffic directly to AT&T and retain other "O" traffic. Cascade contends that it cannot do so because its "network in place"

---

[1] Cascade Utilities, Inc., AT&T Petition for Declaratory Ruling, filed November 15, 1991 (AT&T Petition).

[2] Cascade and Sierra filed separate comments on January 6, 1992. AT&T, Chillicothe Telephone Company (Chillicothe), Frederick and Warinner (F&W), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), the United States Telephone Association (USTA), and the Volcano Telephone Company (Volcano) each filed reply comments on February 5, 1992.

[3] On April 19, 1991, Cascade filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. §69.1 *et seq.*, to enable Cascade to tariff its operator services under the local switching rate element of the access category and to allocate the costs of those services to that element. Cascade contended that grant of such a waiver would enable Cascade to recover more reliably the costs of providing operator services in the future. Cascade Comments at 7. In an Order released June 16, 1992, the Bureau denied Cascade's waiver petition because, under an earlier Bureau waiver, Cascade can recover some of these costs from IXCs and the remainder may be attributed to Cascade's overhead. *See* Sierra Telephone Company, Inc., *et al.*, Memorandum Opinion and Order, 7 FCC Rcd 3771 (Com.Car.Bur. 1992) (*Sierra Order*).

[4] AT&T Petition at 1-3, 6 n.* (*citing* Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, Report and Order, 2 FCC Rcd 6600 (1987) (*Puerto Rico Order*).

[5] Section 6.7.1(E) of the National Exchange Carrier Association (NECA) tariff in which Cascade participates states that, ". . . [t]he telephone number dialed by the customer's end user shall be a seven or ten digit number for calls in the North American Numbering Plan (NANP). . . . The form of the numbers dialed by the [FGC] customer's end user is . . . 0 or 1+NXX-XXXX, [or] 0 or 1+ NPA NXX-XXXX . . . ." NECA Tariff F.C.C. No. 5, Access Service, Page 6-76 (effective June 13, 1988).

does not have the technical capability to distinguish the jurisdictional nature of "O" calls before those calls are received by its operators. To comply with AT&T's request, Cascade contends, it would have to automatically transfer all "O" calls to AT&T. *Id.* at 4, 13-14. *Accord* OPASTCO Reply at 1. Since any termination of the existing arrangement would compel Cascade to route all "O" traffic to AT&T and thereby impair Cascade's own local operator service, Cascade claims such termination would violate Section 214 of the Communications Act, 47 U.S.C. § 214. Cascade Comments at 3, 14. AT&T replies that it does not ask Cascade to connect all "O" calls to AT&T's operator system and disputes Cascade's claim that its equipment is not capable of separately routing "O+" interLATA traffic to AT&T. AT&T Reply at 3-5.

7. USTA agrees with Cascade's contention that, at present, compliance with AT&T's request would require either that AT&T provide all local operator services for Cascade or that AT&T reroute local operator calls back to Cascade. Alternatively, USTA claims fulfilling AT&T's request would require Cascade to deploy a new equal access capability that would automatically separate interstate traffic from other traffic handled by Cascade. USTA Reply at 2-3. However, USTA argues that under applicable Commission orders, AT&T cannot compel an independent LEC, such as Cascade, to make that equal access change because AT&T has not demonstrated adequate need. *Id.* at 3-5. Sierra adds that AT&T's unilateral termination of contracts for local company operator services evidences AT&T's intent to monopolize operator services. Sierra Comments at 3-4. *Accord* Volcano Reply at 5; F&W Reply at 2, Chillicothe Reply at 2.

8. The parties disagree on whether "O+" interLATA traffic originating in the Cascade area is diverted or otherwise impaired as AT&T contends. Cascade Comments at 3-5, 11 n.5. Cascade claims that the Commission's *Puerto Rico Order* does not support AT&T's impairment assertions. Cascade claims that, unlike the off-shore LEC in that case, Cascade has not taken any action to impair the features of premium access provided to AT&T because all "O+" interLATA toll calls from its area are connected to AT&T. Cascade Comments at 3-5, 10-11. AT&T replies that Cascade's conduct denies AT&T a key feature of its premium access under the *Puerto Rico Order*, the right to receive directly all interstate, interLATA calls dialed on a "O+" basis. AT&T Reply at 3-4, 5-6.

9. There is also disagreement over whether Cascade's current handling of "O+" interLATA traffic complies with the NECA tariff in which Cascade participates. Because Cascade's access tariff requires only that AT&T receive "all interstate interLATA calls placed using the O+ dialing format," Cascade argues that it remains in compliance with that tariff. *Id.* at 12. AT&T disagrees, repeating its contention that, as Cascade's Feature Group C customer, it is entitled to directly receive "O+" interLATA traffic dialed by customers in Cascade's area. AT&T Reply at 3-4. Moreover, in response to AT&T's claim that AT&T has the right to perform these operator services itself rather than employ others to do so, Cascade maintains that the authorities cited by AT&T are either not relevant or that they support Cascade's determination to continue to provide these services itself. *Id.* at 10. *Accord* Volcano Reply at 4 n.6.

10. Noting that AT&T has not compensated Cascade for these operator services since May 1991, Cascade also asks the Commission to take action under Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), to ensure that AT&T provides Cascade appropriate compensation. Cascade Comments at 2-3, 15-16. *Accord* Volcano Reply at 3. Cascade claims that because of the value of its operator services to its community as well as to IXCs, the public interest would be best served by allowing it to continue to provide operator assistance on all "O+" interLATA traffic. Cascade contends that its local operator services may cease to be economically viable without continued revenues from the interexchange operator services at issue here. *Id.* at 13-14. *Accord* Sierra Comments at 5-6. *See also* F&W Reply at 2-3; OPASTCO Reply at 4; Chillicothe Reply at 2-4; Volcano Reply at 4-5.

IV. DISCUSSION

11. The Commission has the power to issue declaratory rulings to terminate controversies or remove uncertainties.[6] Whether the Commission chooses to issue a declaratory ruling is a matter within its "sound discretion."[7] When the facts are not disputed, the Commission has elected to grant petitions for such rulings.[8] However, such relief is not generally granted where, as in the present case, all relevant facts are not clearly developed and essentially undisputed.[9]

12. In particular, it is unclear from the record whether it is technically feasible for Cascade to route "O+" interLATA traffic directly to AT&T as AT&T requests but still retain for itself all other "O" traffic. Section 201(a) the Act, 47 U.S.C. § 201(a), makes it the duty of Cascade and other common carriers engaged in interstate communications to furnish communications service "upon reasonable request therefor." However, on the record before us, we are not able to determine the reasonableness of AT&T's request. This is due, in part, to the factual dispute as to Cascade's ability to route "O+" interLATA traffic directly to AT&T and retain for itself all other "O+" calls. Furthermore, until the record is better developed, we are unable to determine whether the public interest would be served by compelling Cascade to route all "O+" interLATA calls to AT&T or any other IXC prior to an appropriate request for conversion to equal access. Accordingly, we will not grant the specific relief requested by AT&T.[10]

13. In addition, AT&T is mistaken in its contention that Cascade is legally obligated under the NECA tariff and the Commission's *Puerto Rico Order* to route "O+" inter-

---

[6] *See* Section 554(e) of the Administrative Procedure Act, 5 U.S.C. 554(e); *See also British Caledonia Airways, Ltd. v. CAB*, 584 F.2d 982, 993-994 (1978).

[7] Section 554(e) of the Administrative Procedure Act, 5 U.S.C. 554(e). *See also Trans International Airlines, Inc. v. CAB*, 432 F.2d 607, 612 n.9 (D.C. Cir. 1970). *See also Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976); *Viacom International Inc. v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982).

[8] *See* American Telephone and Telegraph Company, 3 FCC Rcd 5071 (Com.Car.Bur. 1988)(granting declaratory ruling petition to resolve various access tariffs issues where facts were not disputed).

[9] *See* Aeronautical Radio, Inc., 5 FCC Rcd 2516, 2518-2519 (Com.Car.Bur. 1990) and American Network, Inc., 4 FCC Rcd 550, 551 (Com.Car.Bur. 1989).

[10] We note, however, that we have addressed Cascade's compensation claim in an earlier order. In 1991, Cascade and two

LATA traffic directly to AT&T. The NECA tariff sets forth the numerical sequences necessary to initiate "O+" inter-LATA calls under Feature Group C. It does not set forth the manner in which such calls are to be routed to the IXC. Thus, contrary to AT&T's assertion, Cascade has not violated its tariff and is providing AT&T with Feature Group C as set forth in that tariff. AT&T's citation to the *Puerto Rico Order* is inapposite. The access provided to AT&T by the Puerto Rico Telephone Company (PRTC) was an interim step taken in anticipation of PRTC's conversion to equal access. Cascade has undertaken no such conversion, nor has it been directed to do so. Furthermore, in a later order, the Commission expressly declined to compel PRTC to route such "O+" interLATA calls directly to AT&T's operators prior to PRTC's conversion to equal access.[11]

V. ORDERING CLAUSE

14. ACCORDINGLY, IT IS ORDERED that the petition for declaratory ruling filed by American Telephone and Telegraph Company IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

---

other LECs filed petitions for waivers of Part 69 of the Commission's Rules, 47 C.F.R. § 69.1 *et seq.*, that would enable them to tariff operator services under their existing local switching access rate elements. We denied those petitions in an order released after Cascade filed its comments in response to the AT&T petition. In that order, we explained that, to the extent LECs, such as Cascade, provide AT&T and others with certain operator transfer services, those LECs can use the Bureau's earlier blanket waiver to recover their costs on a per call basis. We expressly declined to expand that blanket waiver to allow such LECs to recover on a per minute of use basis the costs of providing various other operator services for which these LECs had also sought compensation. *Sierra Order*, 7 FCC Rcd at 3772.

[11] *See Puerto Rico Telephone Co., Equal Access Conversion Schedule*, 5 FCC Rcd 118 (Com.Car.Bur. 1989).

[12] The dispute which led to AT&T's petition appears well suited to resolution through alternate dispute resolution techniques. Accordingly, we encourage the parties to consider the use of such procedures. *See* Use of Alternate Dispute Resolution Procedures in Commission Proceedings, GC Docket No. 91-119, 6 FCC Rcd 5669, 5670 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of J.C. Maxwell
Broadcasting Group, Inc.,

Licensee of Noncommercial
Radio Station WMPR(FM),
Jackson, MS,

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 5, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $7,500 Notice of Apparent Liability (NAL) issued May 27, 1992,[1] to J.C. Maxwell Broadcasting Group, Inc., licensee of Noncommercial Radio Station WMPR(FM), Jackson, MS, and (2) the licensee's response to the NAL dated July 24, 1992, asking that the forfeiture be reduced.

2. The NAL was issued for repeated violations of Section 399B of the Communications Act of 1934, as amended, which prohibits noncommercial stations such as WMPR from broadcasting advertisements. 47 U.S.C. § 399b. *See also* 47 C.F.R. § 73.503. The licensee has admitted the violations but says they were inadvertent, due to inexperience and ignorance of the rules. These excuses are not reasons to mitigate a forfeiture. *See Springtown Educational Broadcasting Foundation*, 7 FCC Rcd 2588 (MMB 1992).

3. The licensee claims financial hardship, as evidenced by its Chapter 11 bankruptcy status. While there is precedent for reducing a forfeiture under such circumstances, *see TransNational Network, Inc.*, 52 RR 2d 1321 (1982), we do not believe a reduction is justified in such a case as this. WMPR violated the same rule on numerous occasions for almost two years (between December 5, 1989, and September 18, 1991); violations continued even after two letters of inquiry from the Commission (dated April 9 and June 13, 1991); and after the NAL was issued we continued to receive complaints about WMPR's underwriting announcements.[2]

4. Accordingly, we DENY the licensee's request for a reduced forfeiture. Pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that J.C. Maxwell Broadcasting Group, Inc., licensee of Radio Station WMPR(FM), Jackson, MS, FORFEIT to the United States the sum of seven thousand five hundred dollars ($7,500) for repeated violations of 47 U.S.C. § 399b. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

---

[1] *See J.C Maxwell Broadcasting Group, Inc.*, 7 FCC Rcd 3218 (MMB 1992).

[2] One announcement, apparently broadcast on July 31, 1992, contains a reference to the Club LaRose [underwriter] "happy hour," which we consider to be price information and/or an inducement to patronize the establishment. We call the licensee's attention to this infraction, a promotional element more subtle than those originally sanctioned in the NAL, and also to a recent decision (released October 23, 1992) which warned: [W]hile the Commission has not adopted any quantitative guidelines on underwriting announcements, the longer an announcement takes to identify the underwriter, the more likely it is to be promotional." *Letter to WNYE-TV*, 7 FCC Rcd 6864, 6865 (MMB 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-12

In the Matter of

Amendment of Section 73.202(b), RM-8151
Table of Allotments,
FM Broadcast Stations.
(Galliano and Buras Triumph,
Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 21, 1993; Released: February 5, 1993

Comment Date: March 29, 1993
Reply Comment Date: April 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Callais Cablevision, Inc. ("petitioner"), licensee of Station KBAU-FM, Galliano, Louisiana, seeking the substitution of Channel 232C2 for Channel 232C3 at Galliano and modification of Station KBAU-FM's license to specify operation on the higher powered channel. In order to accommodate the upgrade at Galliano, petitioner also requests the substitution of Channel 278A for vacant Channel 231A at Buras Triumph, Louisiana. Petitioner states that it will apply for Channel 232C2, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 232C2 for Channel 232C3 at Galliano, since it could provide the community with a wide coverage area FM service. Channel 232C2 can be allotted to Galliano in compliance with the Commission's minimum distance separation requirements, provided the Channel 278A is substituted for vacant Channel 231A, or alternatively, Channel 231A is deleted from Buras Triumph, Louisiana.[1] Channel 232C2 can be allotted to Galliano without the imposition of a site restriction.[2] As requested, we shall propose to modify the license of Station KBAU-FM at Galliano, Louisiana, to specify operation on Channel 232C2 in lieu of Channel 232C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We shall also seek comments as to whether we should delete Channel 231A at Buras Triumph. Channel 231A was allotted to Buras Triumph in MM Docket No. 84-231. *See* 50 FR 3514, January 25, 1985. The window for filing applications opened on August 31, 1987, and closed on October 8, 1987. An application was filed by Richard Edward Simmons and subsequently Mr. Simmons was granted a construction permit to build a new station. However, on April 17, 1992, the construction permit for Station KESN-FM at Buras Triumph was cancelled and no other applications were filed. Therefore, if no applications are filed for Channel 231A during the comment cycle in this proceeding, we shall delete the channel at Buras Triumph.

4. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

OPTION I

	Channel No.	
City	Present	Proposed
Galliano, Louisiana	232C3	232C2
Buras Triumph, Louisiana	231A	278A

OPTION II

Galliano, Louisiana	232C3	232C2
Buras Triumph, Louisiana	231A	--

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated byH& reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 29, 1993**, and reply comments on or before **April 13, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Marjorie R. Esman, Esq.
Hardy and Carey
111 Veterans Boulevard
Metairie, Louisiana 70005
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the*

[1] The coordinates for Channel 231A at Buras Triumph are North Latitude 29-17-29 and West Longitude 89-30-07.
[2] The coordinates for Channel 232C2 are North Latitude 29-26-00 and West Longitude 90-17-54.

Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-13

In the Matter of

Amendment of Section 73.202(b), RM-8156
Table of Allotments,
FM Broadcast Stations.
(Blanchard, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 21, 1993; Released: February 5, 1993

Comment Date: March 29, 1993
Reply Comment Date: April 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Daryl L. Bordelon ("petitioner") requesting the allotment of Channel 271C3 to Blanchard, Louisiana, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Petitioner states that Blanchard is an incorporated community with a 1990 U.S. Census population of 1,223 persons. Petitioner notes that there are no broadcast stations licensed to Blanchard and adoption of his proposal will provide the community with its first local service.

3. We believe the public interest would be served by proposing the allotment of Channel 271C3 to Blanchard, Louisiana, since it could provide the community with its first local FM transmission service. Channel 271C3 can be allotted to Blanchard in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.8 kilometers (0.5 miles) north to avoid a short-spacing conflict with Station KDET-FM, Channel 272A, Center, Texas.[1]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Blanchard, Louisiana	--	271C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 29, 1993**, and reply comments on or before **April 13, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Daryl L. Bordelon
6036 Dillingham Avenue
Shreveport, Louisiana 71106
(Petitioner)

Larry G. Fuss
Contemporary Communications
P.O. Box 1787
Cleveland, Mississippi 38732
(Consultant to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] The coordinates for Channel 271C3 at Blanchard are North Latitude 32-35-18 and West Longitude 93-53-31. Petitioner proposed coordinates North Latitude 32-35-25 and West Longitude 93-52-53 with a site restriction of 7.7 kilometers west. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 271C3 at Blanchard, Louisiana.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-14

In the Matter of

Amendment of Section 73.202(b), RM-8155
Table of Allotments,
FM Broadcast Stations.
(Bethany Beach, Delaware)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 21, 1993; Released: February 5, 1993

Comment Date: March 29, 1993
Reply Comment Date: April 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Roger A. Akin and Banking Services Corp., Co-Receivers of KAT Broadcasting Corporation ("petitioner"), requesting the substitution of Channel 240B1 for Channel 240A at Bethany Beach, Delaware, and the modification of Station WWTR(FM)'s license to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 240B1 for Channel 240A at Bethany Beach since it could provide the community with a wide coverage area FM service. Channel 240B1 can be allotted at Bethany Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.1 kilometers (0.1 miles)[1] northwest of the community. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 240B1 at Bethany Beach or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bethany Beach, Delaware	240A, 278A	240B1, 278A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 29, 1993**, and reply comments on or before **April 13, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Matthew W. McCormick
Reddy, Begley & Martin
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037
(Counsel for Roger A. Akin and Banking
Services Corp., Co-Receivers of KAT
Broadcasting Corporation)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 240B1 at Bethany Beach are North Latitude 38-32-24 and West Longitude 75-03-23.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-333

In the Matter of

Amendment of Section 73.202(b),	RM-7340
Table of Allotments,	RM-7518
FM Broadcast Stations.	
(Mora, Bosque Farms and Socorro, New Mexico)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 27, 1993; Released: February 5, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 4534 (1990), proposing the allotment of Channel 284A to Mora, New Mexico, as requested by Voices of the Desert ("petitioner"). In response to the *Notice*, H&HSB Corporation ("H&HSB") filed a counterproposal requesting the reallotment of Channel 284C from Socorro to Bosque Farms, New Mexico, as the community's first local FM transmission service, and the modification of Station KMXQ's license to specify Bosque Farms as its community of license.[2] H&HSB also filed reply comments supporting its counterproposal. No other comments were received.

2. As an initial matter, we note that neither the petitioner nor any other party expressed an intention to apply for Channel 284A, if allotted to Mora. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted and thus it is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, we shall dismiss the proposal to allot Channel 284A to Mora. *See Fort Ann, New York*, 6 FCC Rcd 907 (1991), *Woodsville, New Hampshire*, 6 FCC Rcd 609 (1991), and paragraph 2 of the Appendix to the *Notice*.

3. H&HSB states that the allotment of Channel 284C to Bosque Farms could provide the community with its first local FM transmission service. It states that Bosque Farms is incorporated, with a 1980 U.S. Census population of 3,353 persons and a 1988 estimated population of 4,030 persons.[3] H&HSB describes Bosque Farms as having a mayor-council form of government, with its own police and fire departments, library and both public and private schools. H&HSB commits to applying for the channel, if allotted.

4. We believe the public interest would be served by reallotting Channel 284C from Socorro to Bosque Farms, and modifying petitioner's license for Station KMXQ to specify Bosque Farms as its community of license. Petitioner has shown that the reallotment will result in a preferential arrangement of allotments. Bosque Farms would receive its first local aural transmission service while Socorro will continue to have local aural transmission service from Station KSRC(AM) and a new FM station on Channel 225A, for which a construction permit has been granted (BPH-911004MI).

5. Channel 284C can be allotted to Bosque Farms in compliance with the Commission's minimum distance separation requirements with a site restriction of 39.8 kilometers (24.7 miles) southwest to avoid a short-spacing to Station KCEM-FM, Channel 283C, Bloomfield, New Mexico, and to accommodate petitioner's desired transmitter site.[4] Mexican concurrence in the allotment has been received since Bosque Farms is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Bosque Farms, New Mexico	284C
Socorro, New Mexico	225A

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of H&HSB Corporation for Station KMXQ IS MODIFIED to specify operation on Channel 284C at Bosque Farms, New Mexico, instead of Socorro, New Mexico, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must

[1] The communities of Bosque Farms and Socorro have been added to the caption.

[2] Public Notice of the counterproposal was given on October 12, 1990, Report No. 1827.

[3] The 1990 U.S. Census lists the population of Bosque Farms as 3,791 persons.

[4] The coordinates for Channel 284C at Bosque Farms are North Latitude 34-34-40 and West Longitude 106-57-40.

submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, H&HSB Corporation, licensee of Station KMXQ, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

9. IT IS FURTHER ORDERED, That the petition of Voices of the Desert (RM-7340) to allot Channel 284A to Mora, New Mexico, IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-142

In the Matter of

Amendment of Section 73.202(b), RM-8014
Table of Allotments,
FM Broadcast Stations.
(Brighton, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 4, 1993; Released: February 5, 1993

By the Chief, Allocations Branch:

1. At the request of Renard Communications Corp. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 4389 (1992), proposing the allotment of Channel 231A to Brighton, New York, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. West Irondequoit Central School District ("West Irondequoit") filed comments in opposition to which the petitioner responded.

2. West Irondequoit is the licensee of Class D noncommercial educational Station WIRQ, Channel 232, Rochester, New York. If Channel 231A is allotted to Brighton, West Irondequoit would be required to operate Station WIRQ on a different channel as Station WIRQ would cause interference within the Brighton station's protected contour. West Irondequoit is aware that, as a Class D station, it is a secondary service and may continue to operate only so long as it does not provide interference to any primary service. However, it argues that due to the limited available spectrum in the Rochester area, the allotment of Channel 231A to Brighton might, in fact, require Station WIRQ to cease operation. Further, it contends that Brighton is already well served by seven commercial FM, one noncommercial educational AM and five commercial AM stations licensed to Rochester as well as another four FM stations licensed to communities within Monroe County and thus is less in need of another commercial service than the continuation of the educational service provided by Station WIRQ to the student population.

3. West Irondequoit notes that the Brighton allotment also would be short-spaced to two Canadian facilities, Stations CBL-FM, Channel 231C1, Toronto, and CBBB-FM, Channel 232B, Belleville, Ontario and closely spaced to Station WACZ, Channel 230A, Dansville, New York. While it recognizes that the petitioner proposes to restrict its operation in order to provide the required protection to the short-spaced stations, it contends that the degree of short-spacing runs contrary to the standards of sound allotment practice. Further, West Irondequoit charges that neither the petitioner nor the Commission has adequately shown that the Brighton and Toronto stations will not cause prohibited interference to each other. According to its consulting engineer, West Irondequoit submits that the interference received and caused when measured using actual terrain is greater than that believed to occur when the assumptions are based on uniform terrain. Therefore, it concludes that a Channel 231A Brighton station will be a "second-rate facility at best and one with a far less usable contour distance than a normally-authorized 6 kW/100m AAT facility."

4. Petitioner states that Station WIRQ is a secondary Class D station, and as such, is not entitled to any interference protection from either domestic or Canadian full service stations. Further, while it is true that Station WIRQ will have to relocate to another channel if Channel 231A is allotted to Brighton, petitioner contends that the interference which Station WIRQ will receive from the newly authorized but not yet operational Station CBBB, Channel 232B, Belleville, Ontario, will also result in Station WIRQ being forced to relocate to a new channel. In this regard, petitioner suggests either Channel 298 or Channel 300 as alternatives for Station WIRQ. It also disputes West Irondequoit's claim that the new Brighton station will cause prohibited interference to the Canadian stations to which it is short-spaced, again stating that it can and will adequately protect the affected stations.

5. After reviewing the pleadings before us, we believe the public interest would be served by allotting Channel 231A to Brighton, New York, as the community's first local FM service. First, we find that Brighton is a community for allotment purposes. As stated in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), community status is presumed to exist if a community is incorporated or listed in the U.S. Census. While this presumption can be rebutted, West Irondequoit provides no showing as why community status should be denied beyond the bald statement that Brighton is not incorporated and "in most respects is a bedroom community" of Rochester. West Irondequoit acknowledges that Brighton is listed in the 1990 Census with a population of 34,455 persons and has its own local government. We also reject West Irondequoit's argument that petitioner has failed to demonstrate why Brighton and not some other unidentified community should receive its first local aural service. The Commission does not require petitioners to provide detailed demographic information at the time of the filing of the petition unless and until it becomes mutually exclusive with another proposal. *See Revision of FM Assignment Policies and Procedures, supra.* In this case, the Brighton allotment is not in conflict with any other proposal and thus the petitioner need not submit such information. Further, it is Commission policy to allot channels to communities only upon the affirmative statement that the channel will be applied for and activated in a timely manner. West Irondequoit does not identify any other community which it believes to be more deserving than Brighton and provides no statement of intent to apply for the channel, if allotted.

6. We find that the short-spacing between Channel 231A at Brighton and Channels 231C1 at Toronto and 232B at Belleville, Ontario, Canada, is not an impediment to the adoption of petitioner's proposal. The Commission has determined that the Brighton station can limit its power in

the direction of the Canadian stations to avoid any prohibited interference and Canada has agreed to the proposed allotment.[1]

7. Finally, the fact that the allotment of Channel 231A to Brighton will require Station WIRQ to relocate to another channel is not an impediment to the adoption of petitioner's proposal. As West Irondequoit is aware, Class D stations such as WIRQ, are secondary services and must operate pursuant to the provisions of Section 73.512 of the Commission's Rules. That section states that Class D stations may continue to operate only so long as no interference is caused to any commercial FM broadcast stations. However, as petitioner has suggested, it may be possible for Station WIRQ to relocate to another frequency.

8. Channel 231A can be allotted to Brighton in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.1 kilometers (5 miles) east to avoid a short-spacing to Station WACZ, Channel 230A, Dansville, New York.[2] Canadian concurrence in the allotment of Channel 231A to Brighton, as a specially negotiated allotment, has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Brighton, New York	231A

10. The window period for filing applications will open on **March 23, 1993**, and close on **April 22, 1993**.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] It is, of course, expected that any Canadian station which would cause prohibited interference to the Brighton station will operate in such a manner as to comply with the relevant provisions of the U.S.-Canadian FM Working Agreement.

[2] The coordinates for Channel 231A at Brighton are North Latitude 43-08-55 and West Longitude 77-27-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-240

In the Matter of

Amendment of Section 73.202(b),	RM-8085
Table of Allotments,	
FM Broadcast Stations.	
(Yakima, Washington)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1993; Released: February 5, 1993

By the Chief, Allocations Branch:

1. At the request of KZTA Broadcasting, Inc. ("petitioner"), licensee of Station KZTA-FM, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 6819 (1992), proposing the substitution of Channel 259C3 for Channel 257A at Yakima, Washington, and the modification of Station KZTA-FM's license to specify operation on the higher powered channel.[1] Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 259C3 for Channel 257A at Yakima, Washington, since it would provide the community with a wide coverage area FM service. Channel 259C3 can be allotted to Yakima in compliance with the Commission's minimum distance separation requirements at petitioner's requested site with a site restriction of 16 kilometers (9.9 miles) southeast to avoid a short-spacing to Station KISW, Channel 260C, Seattle, Washington.[2] As requested, we will also modify Station KZTA-FM's license to specify operation on Channel 259C3 at Yakima, Washington, in accordance with Section 1.420(g) of the Commission's Rules. Since Yakima is located within 320 kilometers (200 miles) the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Yakima, Washington	233C1, 252A, 259C3, 281C, 289C1, 297C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KZTA Broadcasting, Inc., for Station KZTA-FM, Yakima, Washington, IS MODIFIED to specify operation on Channel 259C3, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KZTA Broadcasting, Inc., licensee of Station KZTA-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, the assignment of the license for Station KZTA-FM from Big Bang, Inc., to KZTA Broadcasting, Inc., was granted on June 8, 1992 and consummated on June 30, 1992. *See* File No. BAL-920218ED.

[2] The coordinates for Channel 259C3 at Yakima are North Latitude 46-31-20 and West Longitude 120-19-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-66

In the Matter of

Amendment of Section 73.202(b), RM-7940
Table of Allotments,
FM Broadcast Stations.
(Sun City, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 28, 1993; Released: February 5, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 2271 (1992), issued in response to a petition filed on behalf of Resource Media, Inc. ("petitioner"), licensee of Station KONC-FM, Channel 292A, Sun City, Arizona, proposing the substitution of Channel 292C2 for Channel 292A and modification of its license accordingly to specify the higher class channel. Petitioner filed supporting comments in support of its proposal. No other comments were received.

2. As stated in the *Notice*, the site specified by petitioner to accommodate requested Channel 292C2 is located 42.3 kilometers (26.2 miles) north of the community,[1] whereas the 70 dBu signal of a Class C2 allotment is assumed to extend a distance of 32.6 kilometers (20.2 miles) from the farthest boundary of the community.[2] Therefore, it would be necessary to employ conventional Class C2 facilities (50 kW at 150 meters), to provide a 70 dBu contour over the entire community. Based upon our staff engineering analysis, it was determined that since the average terrain elevation at the petitioner's proposed site is 779 meters AMSL, the antenna radiation center height would be 929 meters AMSL. Therefore, we found that an antenna height of 247 meters (810 feet) AGL at the petitioner's proposed site would be required to attain maximum Class C2 facilities. Although agreeing with petitioner's technical showing with respect to the antenna radiation center height AMSL (779 meters) our engineering analysis determined the ground elevation at its proposed site to be 682 meters AMSL. As a result, we found that the petitioner's proposed use of a 185 meter AGL antenna at its specified site would result in an overall antenna height of 867 meters AMSL. Since the antenna radiation center would not exceed 88 meters HAAT at the petitioner's proposed site, we determined that in combination with an effective radiated power of 50 kW, a 70 dBu signal would not encompass Sun City. Therefore, petitioner was requested to provide additional information to demonstrate its ability to comply with the requirements of Section 73.315 of the Commission's Rules, and to provide evidence of FAA clearance for a tower of 247 meters (810 feet) at its specified site.

3. In response, petitioner asserts that the Commission's calculation of the ground elevation at its proposed site appears to have been derived from a topographic data base rather than a topographic map, citing *Digitized Terrain Data (HAAT Calculations)*, 57 R.R. 2d 415, 416 (1984). Petitioner states that based on the use of a U.S.G.S. 7.5 minute topographic map, the ground level at its proposed site is 753.5 meters AMSL, and not 682 meters as the Commission previously determined based upon the use of a terrain database. Therefore, petitioner claims that an antenna height of 175.9 meters (576 feet) AGL, and not 247 meters (810 feet), would result in an antenna radiation center of 929.4 meters. Thus, petitioner asserts that from its intended site, a 70 dBu signal will encompass Sun City.

4. With respect to our concern in the *Notice* regarding FAA clearance for a tower to accommodate Channel 292C2, petitioner states that it has received such approval for a tower at 185 meters above ground level at its proposed site.[3]

5. Based upon petitioner's representations, a further staff engineering analysis was undertaken. As a result, it has been determined that the ground level at petitioner's specified site is 753.7 meters AMSL. Therefore, in order to attain an antenna radiation center of 929 meters AMSL, the antenna for Channel 292C2 need not exceed 175.3 meters (575 feet) AGL.

6. We believe the public interest would be served by substituting Channel 292C2 for Channel 292A at Sun City, Arizona, since it could provide the community with an expanded coverage area FM service. We also find that suitable information has been provided to conclude that petitioner can place an acceptable signal over Sun City from its specified site, and that based upon its documentation, the antenna height necessary to accommodate the proposal has received FAA approval.[4]

---

[1] Coordinates at the petitioner's proposed site for Channel 292C2 are 33-58-30 and 112-20-08.

[2] As indicated in the *Notice*, petitioner provided engineering studies, based upon actual terrain characteristics, asserting that its proposal could comply with the requirements of Section 73.315 of the Commission's Rules. Petitioner advised that the average terrain elevation at its proposed site is 779.4 meters. Petitioner further advised that since it has received FAA approval of a tower 185 meters (607 feet) above ground level ("AGL") (938.5 meters (3079 feet) above mean sea level "AMSL"), the use of a tower 150 meters HAAT would extend the 70 dBu signal a distance of 46.7 kilometers (29.0 miles) on a bearing of 170°, thereby covering the entirety of Sun City. *See Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988). Petitioner advised that its engineering calculations were based on the NGDC 30 second terrain database and the Commission's F(50,50) curves. *See* Sections 73.313(d)(1)-(3) and 73.333.

[3] Petitioner advises that clearance was obtained in FAA Study No. 90-AWP-1280-OE, dated August 27, 1991.

[4] Our consideration of the site proposal herein was limited to the question of petitioner's compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, as well as Section 73.315, concerning city grade coverage requirements, and the assurance, in this instance of FAA clearance for a tower at its intended site. The application stage, where the actual proposed operating values are specified, is the proper forum to evaluate petitioner's requested facilities.

7. Channel 292C2 can be allotted to Sun City at the petitioner's specified site, located 42.3 kilometers (26.2 miles) north of the community,[5] Additionally, since Sun City is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government to the proposed allotment of Channel 292C2 to that community, was obtained.

8. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Resource Media, Inc. to specify operation on Channel 292C2 in lieu of Channel 292A at Sun City, Arizona.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Sun City, Arizona	292C2

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Resource Media, Inc. (BLH-851218KB) for Station KONC-FM, IS MODIFIED to specify operation on Channel 292C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Resource Media, Inc., licensee of Station KONC-FM, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Sun City, Arizona.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] As indicated above, coordinates at the reference site for Channel 292C2 are 33-58-30 and 112-20-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-274

In the Matter of

Western Pennsylvania Public
Safety Plan

ORDER

Adopted: February 1, 1993; Released: February 5, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On October 5, 1992, Region 36 (Western Pennsylvania) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the Western Pennsylvania area.

2. The Western Pennsylvania Plan was placed on Public Notice for comments on November 18, 1992, 7 FCC Rcd 77012 (1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Western Pennsylvania and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the Western Pennsylvania area.

4. Therefore, we accept the Western Pennsylvania Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in the Western Pennsylvania area may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 0 and
1 of the Commission's
Rules to Reflect a
Reorganization of the
Private Radio Bureau and
the Field Operations Bureau

ORDER

Adopted: May 12, 1992; Released: February 5, 1993

By the Managing Director:

1. The Commission has before it for consideration proposed changes in the organizations of the Private Radio and Field Operations Bureaus. Implementation of the proposed changes requires amendments to Parts 0 and 1 of the Commission's Rules and Regulations.

2. In order to provide faster and higher quality service in the Commission's enforcement and licensing programs, the Commission is hereby approving the transfer of commercial radio operator licensing and antenna marking and lighting clearance from the Field Operations Bureau to the Private Radio Bureau and the transfer of enforcement functions from the Private Radio Bureau's Compliance Branch to the Field Operations Bureau.

3. The amendments adopted herein pertain to agency organization. The prior notice procedure and effective date provisions of Section 4 of the Administrative Procedures Act are therefore inapplicable. Authority for the amendments adopted herein is contained in Sections 4(i) and 5(b) of the Communications Act of 1934, as amended.

4. IT IS ORDERED, effective October 1, 1992 that Parts 0 and 1 of the Rules and Regulations are amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION

Andrew S. Fishel
Managing Director

FINAL RULES

47 C.F.R. Part 0 is amended as follows:

1. The authority citation for Part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. 47 C.F.R. §0.111 is revised to read as follows:

Section 0.111 Functions of the Bureau

* * * * *

Responsible for all Commission engineering and enforcement activities performed by the Bureau in the field relating to all services including sanction, inspection, investigation and monitoring activities, interference suppression, communications user liaison and administration of the Emergency Broadcast System. * * *

* * * * *

3. 47 C.F.R. §0.111 is amended by revising paragraph (a) to read as follows:

Section 0.111 Functions of the Bureau

* * * * *

(a) Enforce the Commission's rules and regulations; monitor, inspect and investigate all non-government communications matters; issue sanctions.

* * * * *

4. 47 C.F.R. §0.111 is amended by redesignating paragraphs (b) through (l) as paragraphs (d) through (n) and adding paragraphs (b) and (c) to read as follows:

Section 0.111 Functions of the Bureau

* * * * *

(b) Formulate the Commission's Enforcement Plan in collaboration with other Bureaus and Offices and execute the portions of the plan for which the Bureau is responsible.

(c) Participate in the development of the Commission's User Information Services Plan in conjunction with other Bureaus and Offices and execute the portions of the plan for which the Bureau is responsible.

* * * * *

5. 47 C.F.R. §0.111 is amended by revising paragraph (d) to read as follows:

Section 0.111 Functions of the Bureau

* * * * *

(d) Advise the Commission and act in matters regarding field liaison with the user public and local and federal government agencies (Part 0).

* * * * *

6. 47 C.F.R §0.131 is amended by adding paragraph (h) to read as follows:

Section 0.131 Functions of the Bureau

* * * * *

(h) Administers the Commission's commercial radio operator program (part 13) and the Commission's program for construction, marking and lighting of antenna structures (part 17).

* * * * *

7. 47 C.F.R §0.311 is amended by revising paragraph (a)(1) to read as follows:

Section 0.311 Authority delegated

* * * * *

(a) * * *

(1) Notices of proposed rulemaking and of inquiry and final orders in rulemaking and inquiry proceedings.

* * * * *

8. 47 C.F.R. §0.311 is amended by revising paragraph (d)(1) to read as follows:

Section 0.311 Authority delegated

* * * * *

(d) * * *

(1) The scope of the Field Operations Bureau's authority to take such actions includes cases of violation of section 301 or 318 of the Communications Act and any other rule parts or sections specified in statements of policy provided by the other bureaus and offices available for inspection in the Field Operations Bureau. * * *

* * * * *

9. 47 C.F.R. §0.314 is amended by removing paragraphs (a), (d), (f), (p), (q), (r), (v) and (w):

Section 0.314 Additional authority delegated

* * * * *

Paragraphs (a), (d), (f), (p), (q), (r), (v) and (w) are removed and reserved.

* * * * *

10. 47 C.F.R. §0.331 is amended by revising paragraph (a)(1) to read as follows:

Section 0.331 Authority delegated

* * * * *

(a) * * *

(1) Notices of proposed rulemaking and of inquiry, final orders in rulemaking proceedings and inquiry proceedings, and reports arising from any of the foregoing except such orders involving non-substantive revisions to the rules, or orders involving changes clarifying a rule based on established Commission precedent, or conforming one rule within Part 1, Subpart F, Part 13, Part 17 and Parts 80 through 97 with another rule or conforming any of these rules to formally adopted international convention or agreement where novel questions of policy or law are not involved. Also, the addition of new Marine VHF frequency coordinating committee(s) to §80.514 of the Rules need not be referred to the Commission if they do not involve novel questions of policy or law.

* * * * *

11. 47 C.F.R. §0.331 is amended by adding paragraphs (c)(1), (c)(2) and (c)(3) to read as follows:

Section 0.331 Authority delegated

* * * * *

(c) The Chief, Private Radio Bureau is delegated authority to:

(1) Act on requests for a waiver of the english language provisions of Sections 13.22 and 13.23 of this chapter in the case of Spanish-speaking applicants in and around Puerto Rico and Miami, Fla., and to issue licenses bearing appropriate restrictions to those applicants found qualified.

(2) Act on requests for waiver of the written examination requirements of Sections 13.21, 13.22 and 13.23 of this chapter and to authorize oral examinations in lieu thereof.

(3) Act on requests by blind applicants to appear at the appropriate field office for a radiotelephone license examination. (See Sections 13.11 and 13.23 of this chapter.)

* * * * *

12. 47 C.F.R. §0.401 is amended by revising paragraph (a)(3)(i) to read as follows:

Section 0.401 Location of Commission Offices

(a) * * *

(3) * * *

(i) mailing address of the Private Radio Bureau Licensing Division is: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * * * *

13. 47 C.F.R. §0.401 is amended by revising paragraph (b)(1) to read as follows:

Section 0.401 Location of Commission offices

(b) * * *

(1) . . . Section 1.1102 for Private Radio Services and Radio Operator Examinations; Section 1.1103 for Equipment Approvals, Experimental Radio Applications and Ship Inspections; Section 1.104 for Mass Media Services; and Section 1.105 for Common Carrier Services

* * * * *

14. 47 C.F.R. §0.406 is amended by revising paragraph (b) to read as follows:

Section 0.406 The rules and regulations

(b) Contents. Parts 0-19 of the rules have been reserved for provisions of a general nature. Parts 20-69 of this chapter have been reserved for provisions pertaining to common carriers. Parts 70-79 have been reserved for provisions pertaining to broadcasting and cable television. Parts 80-99 of this chapter have been reserved for provisions pertaining to the Private Radio Services. . .

* * * * *

15. 47 C.F.R. §0.453 is amended by revising paragraph (l) to read as follows:

Section 0.453 Public reference rooms

(1) The Private Radio Bureau Reference Room. Commercial radio operator application files and all authorizations in the Private Radio Services and files relating thereto, which includes Land Mobile, Microwave, Aviation, Ground and Marine Coast applications. All of these materials are available in the Commission's offices in Gettysburg, Pennsylvania. See Section 0.457(f)(3) of this chapter.

* * * * *

16. 47 C.F.R. §0.455 is amended by removing paragraph (d).

Section 0.455 Other locations at which records may be inspected

Paragraph (d) is removed and reserved.

* * * * *

17. 47 C.F.R. §0.484 is amended to read as follows:

Section 0.484 Amateur radio operator examinations

Generally, examinations for amateur radio operation licenses shall be administered at locations and times specified by volunteer examiners. (See Section 97.509). When the FCC conducts examinations for amateur radio operator licenses, they shall take place at locations and times designated by the FCC.

* * * * *

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended, as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. 47 C.F.R. §1.61 is amended by revising paragraphs (a), (b), (c) and (f) to read as follows:

* * * * *

Section 1.61 Procedures for handling applications requiring special aeronautical study.

(a) Antenna surveys are conducted by the Licensing Division of the Private Radio Bureau.

(b) Each operating bureau or office examines the applications for which it is responsible to ascertain whether or not antenna consideration is required. If such consideration is required, the antenna data is furnished to the Licensing Division.

(c) The Licensing Division then ascertains whether the applicant is required to submit a "Notice of Proposed Construction or Alteration" [FAA Form 7460-1] to the Federal Aviation Administration.

(f) Upon receipt from the Federal Aviation Administration approving a proposed antenna, the Licensing Division prescribes antenna tower painting and lighting specifications or other conditions in accordance with the provisions of Part 17 of this chapter and forwards this information to the originating bureau or office. If the proposed tower is disapproved, a report of the disapproval is forwarded to the originating bureau or office.

* * * * *

3. 47 C.F.R. §1.83 is amended by revising paragraph (b) to read as follows:

* * * * *

Section 1.83 Applications for radio operator licenses

(b) Application filing procedures for commercial radio operator licenses are set forth in Part 13 of this chapter. Detailed information about application forms, filing procedures, and where to file applications for commercial radio operator licenses is contained in the bulletin "Commercial Radio Operator Licenses and Permits." This bulletin is available from the Private Radio Bureau, Licensing Division, Consumer Assistance Branch, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * * * *

4. 47 C.F.R. §1.85 is amended to read as follows:

* * * * *

Section 1.85 Suspension of operator licenses.

Whenever grounds exist for suspension of an operator license, as provided in section 303(m) of the Communications Act, the Chief of the Private Radio Bureau, with respect to amateur and commercial radio operator licenses, may issue an order suspending the operator license. ***

Upon receipt by the Commission of such application for hearing, said order of suspension shall be designated for hearing by the Chief, Private Radio Bureau and said suspension shall be held in abeyance until the conclusion of the hearing. ***

* * * * *

5. 47 C.F.R. §1.901 is amended to read as follows:

* * * * *

Section 1.901 Scope

In the case of any conflict between the rules set forth in this subpart and the rules set forth in Part 13 or the rules set forth for specific services in Parts 80-99, the rules in this subpart shall govern.

*****

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FINANCIAL SATELLITE CORPORATION — File No. CSS-85-004-P(LA)

Request for One-Year Extension of Time to Demonstrate Permanent Financial Qualifications to Construct and Operate International Satellite Communications Systems

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 1993; Released: February 5, 1993

By the Deputy Chief, Common Carrier Bureau:

1. Financial Satellite Corporation (Finansat) is holder of a conditional authorization to construct, launch and operate a private satellite system providing international communications services between the Atlantic and Pacific Ocean regions by interconnection through a network control center located in the United States. This system is to be comprised of one in-orbit satellite in the North Atlantic Ocean Region (47^0 W.L.) and one in-orbit satellite in the Pacific Ocean Region (178^0 W.L.).

2. On January 3, 1991, Finansat filed a request with the Commission for a one-year extension of the time limit set for demonstrating permanent financial qualifications for construction, launch and operation of its conditionally authorized system. In its request, Finansat alleged that it continues to exercise due diligence in its efforts to implement the system. Finansat predicted that it would, during 1991, be in a position to meet the Commission's financial qualifications and to commence foreign operating agreement and technical consultation requirements. No comments were received concerning the request.

3. On October 30, 1992, the Chief, Common Carrier Bureau, informed Finansat that its request failed to provide information with the specificity necessary for the Commission to make a reasoned determination granting or denying the request. Accordingly, the Bureau required, pursuant to 47 C.F.R. Section 1.17, that Finansat file with the Commission within 30 days certain specific information to supplement its request. The Bureau stated that failure to respond within 30 days would be treated as failure to prosecute, resulting in denial of the application.

4. Finansat did not file this supplemental information within the 30 day period. Neither has Finansat requested or been granted an extension of time to submit this supplemental information.

5. Accordingly, IT IS ORDERED that the request of Finansat for a one-year extension of time to demonstrate permanent financial qualifications IS DENIED.

6. IT IS FURTHER ORDERED that Finansat's conditional authorization IS DECLARED NULL and VOID, since Finansat has not persuaded any foreign correspondents to initiate consultation under Article XIV(d) of the INTELSAT Agreement, nor demonstated permanent financial qualifications pursuant to the terms of its conditional authorization (FCC 86-13, released Jan.15, 1986).

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

McCAW SPACE TECHNOLOGIES, INC. File No. CSS-86-003-LA

Request for One-Year Extension of Time to Demonstrate Permanent Financial Qualifications to Construct and Operate International Satellite Communications Systems

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 1993; Released: February 5, 1993

By the Deputy Chief, Common Carrier Bureau:

1. McCaw Space Technologies, Inc. (McCaw) is holder of a conditional authorization to construct, launch and operate a private satellite system providing international communications services between the Indian and Pacific Ocean regions by interconnection through a network control center located in Guam. This system is to be comprised of one in-orbit satellite in the Indian Ocean Region (70^0 E.L.) and one in-orbit satellite in the Pacific Ocean Region (170^0 E.L.).

2. On August 28, 1990, McCaw filed a request with the Commission for a one-year extension of the time limit set for demonstrating permanent financial qualifications for construction, launch and operation of its conditionally authorized system. In its request, McCaw alleged that it continues to exercise due diligence in its efforts to implement the system. No comments were received concerning the request.

3. On October 30, 1992, the Chief, Common Carrier Bureau, informed McCaw that its request failed to provide information with the specificity necessary for the Commission to make a reasoned determination granting or denying the request. Accordingly, the Bureau required, pursuant to 47 C.F.R. Section 1.17, that McCaw file with the Commission within 30 days certain specific information to supplement its request. The Bureau stated that failure to respond within 30 days would be treated as failure to prosecute, resulting in denial of the application.

4. McCaw filed an affadavit on November 30, 1992. This affadavit lists two specific actions that McCaw has undertaken pursuant to its current conditional authorization. First, the affadavit states that McCaw has authorized a third party to enter into discussions with General Electric as the satellite vendor and possible funding source. Second, the affadavit also alleges that McCaw has contacted potential foreign correspondents and provided technical information that they had requested.

5. The Bureau's letter stated that the affadavit must include a record, including dates, places and names of contacts, of significant written correspondence and meetings concerning McCaw's efforts in obtaining financing, operating agreements and customers. The Bureau also required that the affadavit include a credible business plan to ensure launch and operation by a date certain.

6. We find that McCaw's affadavit does not comply with the requirements stated in the Bureau letter. It does not include a detailed record of its efforts in obtaining financing, operating agreements and customers nor a credible business plan. Thus, the affadavit does not provide sufficient basis to support the grant of an extension of time to demonstrate permanent financial qualifications.

7. Accordingly, IT IS ORDERED that the request of McCaw for a one-year extension of time to demonstrate permanent financial qualifications IS DENIED.

8. IT IS FURTHER ORDERED that McCaw's conditional authorization IS DECLARED NULL and VOID, since McCaw has not persuaded any foreign correspondents to initiate consultation under Article XIV(d) of the INTELSAT Agreement, nor demonstrated permanent financial qualifications pursuant to the terms of its conditional authorization (Memorandum Opinion, Order and Authorization, 2 FCC Rcd 259 (1987)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONET, INC. File No. I-T-C-92-253

Application for Authority to
provide international television
service via the TDRS-41 Satellite

ORDER AND AUTHORIZATION

Adopted: January 27, 1993; Released: February 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by MicroNet, Inc. (MicroNet), pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-253 IS GRANTED, and MicroNet is authorized to establish two (2) 36-MHz channels of communication between its appropriately licensed earth stations in the U.S. and the TDRS-41 satellite for the provision of international television service between the U.S. and currently authorized points of communications listed in Appendix A as well as those points which the Commission may authorize in the future to be served by the TDRS-41 satellite.

3. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

7. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites for the provision of the service(s) authorized herein.

8. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in each of the countries to which it is authorized to provide service, and the applicant shall file copies of the agreement with the Commission within 30 days of its execution.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Austria
Bahamas
Belgium
Canada
France
Germany
Ireland
Israel
Jamaica
Luxembourg
Mexico
Netherlands
Portugal
Sweden
Switzerland
United Kingdom

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ON CALL COMMUNICATIONS, INC. File No. I-T-C-92-266

For Authority Pursuant
to Section 214 of the
Communications Act of 1934 to
Establish Channels of Communication
between the U.S. and INTELSAT Atlantic
and Pacific Satellites for the Provision
of International Business Service

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: January 27, 1993; Released: February 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of International Business Services (IBS) by On Call Communications, Inc. (OCC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-266 IS GRANTED, and OCC is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS.

3. IT IS FURTHER ORDERED that the authority granted herein for OCC to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites for the provision of the service(s) authorized herein.

4. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b).

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that any authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and the points listed in Comsat's Tariff F.C.C. No. 103 -- that is, private lines which originate in the United States and terminate in the points listed in Comsat's Tariff F.C.C. No. 103 or which originate in the points listed in Comsat's Tariff F.C.C. No. 103 and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administrations afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

8. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in each of the countries to which it is authorized to provide service, and the applicant shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (codified at 47 C.F.R. §43.51(a)(3)).

10. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

IDB Aero-Nautical Communications, Inc. — File No. I-T-C-93-013

For authority Pursuant to Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act and Section 214 of the Communications Act of 1934, as amended, to provide Inmarsat-C Mobile Satellite Services via the Inmarsat System in the Indian Ocean Region

IDB Aero-Nautical Communications, Inc. — File No. I-T-C-93-014

For authority Pursuant to Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act and Section 214 of the Communications Act of 1934, as amended, to provide Inmarsat-C Mobile Satellite Services via the Inmarsat System in the Atlantic and Pacific Ocean Regions

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: January 29, 1993; Released: February 5, 1993

By the Chief, International Facilities Division:

1. On October 26, 1992, IDB Aero-Nautical Communications, Inc. dba IDB Mobile Communications (IDB) filed applications pursuant to Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act and Section 214 of the Communications Act of 1934, as amended, for authority to provide Inmarsat-C mobile satellite services via the Inmarsat System in the Atlantic Ocean Region (AOR), Pacific Ocean Region (POR) and Indian Ocean Region (IOR). The applications were placed on public notice on November 4, 1992, and no oppositions were received.

2. IDB requests authority to provide Inmarsat-C mobile satellite services in the ship-to-shore direction in the AOR-East via the Burum, the Netherlands foreign land earth station (LES) operated by PTT Telecom Netherlands and in the ship-to-shore direction in the POR via the Perth, Australia foreign LES operated by OTC Limited of Australia. The applicant states that it will construct its own U.S.-based Inmarsat-C facilities for this traffic as soon as there is adequate volume to justify the cost of modifying its existing U.S.-based Inmarsat LESs.[1] IDB requests authority to provide Inmarsat-C mobile satellite services in the ship-to-shore and shore-to-ship directions in the IOR via the Perth, Australia foreign LES. IDB proposes to provide service in the ship-to-shore direction in the AOR-West via the Communications Satellite Corporation's (Comsat) LES at Southbury, Connecticut. IDB states that it currently has authority to provide maritime mobile satellite service (MMSS) and aeronautical mobile satellite service (AMSS) via the Inmarsat system in the AOR and POR via the LES facilities at Niles Canyon, California, and Staten Island, New York.[2] It also has been granted authority to provide MMSS in the IOR in both the ship-to-shore and shore-to-ship directions via OTC's LES in Perth.[3]

3. The applications inform us that all service will be provided via Inmarsat first and second generation satellites. IDB seeks to offer Inmarsat-C for the following applications: MMSS, AMSS, and land mobile satellite service (LMSS).

4. IDB states that accounting will be performed in accordance with generally accepted accounting principles. Charges and regulations governing the service will be specified in one or more tariffs which IDB will file with the Commission to the extent required by law.

5. According to IDB, grant of this application will serve the public interest because Inmarsat-C service is of enormous benefit to IDB's potential customers. Authorization of IDB to provide Inmarsat-C service in the AOR, POR, and IOR will enable IDB to offer global Inmarsat-C services, which are vital for IDB as a U.S. carrier to compete effectively with foreign Signatories offering global coverage.

6. We note that IDB's proposed services in the AOR and POR are limited to ship-to-shore communications and that no oppositions have been received. In a similar proceeding in the past, Comsat, the U.S. Signatory to Inmarsat, has stated that it:

> believes that the Commission may authorize [IDB] to make arrangements with foreign Signatories for routing of ship-to-shore traffic consistent with the Inmarsat Act. Ship-to-shore traffic in the Inmarsat system may be routed by a maritime sender to whatever coast earth station it desires, and the space segment is provided by the coast earth station operator. The statutory requirement that U.S. carriers obtain space segment from the U.S. Signatory comes into play only with regard to shore-to-ship traffic.[4]

7. Furthermore, in the circumstances present here, we find that it is necessary for IDB to use a foreign LES in order to provide ship-to-shore and shore-to-ship Inmarsat-C

[1] Since the time of this application, these earth stations have been transferred to Southwest Communications, Inc. (SCI). *See* CICI, Inc., File Nos. CSG-92-042-(8)-AL, CSG-92-043-(21)-AL, EID-680, 7 FCC Rcd 6031 (1992).

[2] IDB Aeronautical Communications, Inc., File No. I-T-C-90-088, 6 FCC Rcd 2485 (1991). *See* also n.1, *supra*.

[3] IDB Aeronautical Communications, Inc., File No. I-T-C-91-012, 6 FCC Rcd 5962 (1991).

[4] Communications Satellite Corporation, Petition to Deny in Part, File Nos. I-T-C-91-011 and I-T-C-91-012, filed November 19, 1990.

services in the IOR. Without this arrangement in this case, service would not be possible.[5] Moreover, Comsat is not asserting in this particular proceeding any purported statutory protection under §§ 751 *et seq.* of the Inmarsat Act, which may bar the use of foreign LESs to carry U.S.-originated shore-to-ship traffic without Comsat's provision of the Inmarsat space segment. We therefore infer that Comsat is waiving any statutory right it might have to provide the space segment in this case, if such a right exists.

8. We also note that IDB has pending applications for authority to provide limited international LMSS, File Nos. I-T-C-92-058 and I-T-C-92-059. On August 7, 1992, TAO-2081 was granted permitting IDB temporary authority to provide limited international LMSS until February 2, 1993, or until action in File Nos. I-T-C-92-058 and I-T-C-92-059, whichever is sooner. IDB's LMSS services include (1) communications within and between foreign countries, excluding North America, and (2) communications between North America and mobile terminals located outside North America. IDB does not have authorization to provide LMSS to or from mobile terminals located in North America, defined as the United States, Canada and Mexico.[6]

9. Based on the foregoing, we conclude that it will be in the public interest to grant IDB authority for the provision of ship-to-shore Inmarsat-C MMSS and AMSS in the AOR, POR and IOR, and shore-to-ship Inmarsat-C MMSS and AMSS in the IOR subject to the conditions set forth herein. Because the issue of IDB's use of Inmarsat for international LMSS will be considered in File Nos. I-T-C-92-058 and I-T-C-92-059, we need not here address IDB's request to provide Inmarsat-C LMSS. Therefore, we defer consideration of this issue to File Nos. I-T-C-92-058 and I-T-C-92-059. We will, however, modify TAO-2081 to include Inmarsat-C LMSS via the LESs as authorized herein on an interim basis subject to the same terms and conditions contained in TAO-2081.

10. Accordingly, IT IS ORDERED, pursuant to Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act, 47 U.S.C. §§ 752, 753(c), and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, that the applications of IDB Aero-Nautical Communications, Inc. File Nos. I-T-C-93-013 and I-T-C-93-014 ARE GRANTED IN PART and IDB is authorized to:

A. provide Inmarsat-C mobile satellite services in the ship-to-shore direction in the AOR-West via Comsat's LES at Southbury, Connecticut, in the AOR-East via the Burum, the Netherlands foreign LES operated by PTT Telecom Netherlands, and in the POR via the Perth, Australia foreign LES operated by OTC Limited of Australia,

B. provide Inmarsat-C mobile satellite services in the ship-to-shore and shore-to-ship directions in the IOR via the Perth, Australia foreign LES operated by OTC Limited of Australia, and

C. to offer Inmarsat-C for the following applications: maritime mobile satellite service and aeronautical mobile satellite service.

11. IT IS FURTHER ORDERED that IDB's temporary authority to provide international LMSS granted in TAO-2081 on August 7, 1992, is modified to include Inmarsat-C international LMSS in the ship-to-shore direction in the AOR-West via Comsat's LES at Southbury, Connecticut, in the AOR-East via the Burum, the Netherlands foreign LES operated by PTT Telecom Netherlands, and in the POR via the Perth, Australia foreign LES operated by OTC Limited of Australia, and in the ship-to-shore and shore-to-ship directions in the IOR via the Perth, Australia foreign LES operated by OTC Limited of Australia, subject to the same terms and conditions stated in TAO-2081, including but not limited to conditions relating to consultations required by Article XIV(d) of the Intelsat agreement, frequency use, priority and preemption requirements, and tariffs. IDB's provision of international LMSS will be limited to (1) communications within and between foreign countries, excluding North America, and (2) communications between fixed points in North America and mobile terminals located outside North America. IDB may not provide LMSS to or from mobile terminals located in North America, defined as the land area of the United States, Canada and Mexico. The United States includes Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. This modification of temporary authority shall automatically terminate in the event that the Commission denies IDB's applications in File Nos. I-T-C-92-058 or I-T-C-92-059, or denies any extension of TAO-2081. This modification of temporary authorization is without prejudice to the Commission's action on IDB's applications in File Nos. I-T-C-92-058 and I-T-C-92-059, and the grant of this modification of temporary authorization does not constitute precedent for the determination of any issues raised by those applications.

12. IT IS FURTHER ORDERED that IDB's request to provide regular Inmarsat-C international LMSS via Inmarsat is deferred and will be considered in File Nos. I-T-C-92-058 and I-T-C-92-059.

13. IT IS FURTHER ORDERED that IDB shall not provide any Inmarsat-C service from the United States to points in the AOR or POR under this authorization.

14. IT IS FURTHER ORDERED that IDB will be classified as dominant in the provision of the services authorized herein.

15. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that IDB shall file and have in effect a tariff for the services authorized in this order before offering services to the public.

16. IT IS FURTHER ORDERED that IDB shall file copies of any operating agreements entered into by itself or its parent/affiliates with its correspondents within 30 days of their execution.

---

[5] The only authorized Comsat LES facility that is capable of serving the IOR is a Standard-A LES near Ankara, Turkiye. *See* Communications Satellite Corporation, File No. I-T-C-91-228, 7 FCC Rcd 2218 (1992). That facility does not provide Standard-C service.

[6] IDB clarified the instant applications to include these limitations. *See* letter from Robert S. Koppel, IDB, to Linda Trochim, International Facilities Division, dated January 15, 1993.

17. IT IS FURTHER ORDERED that IDB shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all international points it is authorized to serve within 90 days from the end of each calendar quarter.

18. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PROFESSIONAL VIDEO TRANSMISSION SERVICES CORPORATION — File No. I-T-C-92-265

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Establish Channels of Communication between the U.S. and INTELSAT Atlantic and Pacific Satellites for the Provision of IBS, ITS, IDR, and DataNet Services

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: January 27, 1993; Released: February 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of International Business Services (IBS), International Television Service (ITS), DataNet Service (DataNet), and International Digital Route Service (a/k/a Intermediate Data Rate Service) (IDR) by Professional Video Transmission Services Corporation (PVTS).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-265 IS GRANTED, and PVTS is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS, and to establish two (2) 36-MHz channels for the provision of ITS, between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103.

3. IT IS FURTHER ORDERED that PVTS is authorized to establish one (1) 64-kbps channel of communication for each of the countries listed in Appendix A for the provision of IDR and DataNet services between those countries and appropriately licensed earth stations in the U.S.

4. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b).h)

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites for the provision of the service(s) authorized herein.

8. IT IS FURTHER ORDERED that any authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and the points listed in Comsat's tariff and Appendix A -- that is, private lines which originate in the United States and terminate in the points listed in Comsat's tariff and Appendix A or which originate in the points listed in Comsat's tariff and Appendix A and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administrations afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

9. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

10. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in each of the countries to which it is authorized to provide service, and the applicant shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (codified at 47 C.F.R. §43.51(a)(3)).

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

(A) Atlantic Ocean Area Regions

Latin America	Europe	Middle/Near East & Africa and Other Europe	
Antigua Bahamas	Austria	Algeria	Libya
Argentina	Belgium	Angola	Madagascar
Aruba	Cyprus	Ascension Island	Malagasy Rep.
Bahamas	Denmark	Azores	Malawi
Barbados	Finland	Bahrain	Mali
Belize	France	Benin	Mauritania
Bermuda	Germany	Botswana	Morocco
Bolivia	Greece	Bulgaria	Mozambique
Brazil	Iceland	Burkina Faso	Niger
Cayman Islands	Ireland	Burma	Nigeria
Chile	Italy	Cameroon	Oman
Colombia	Liechtenstein	Canary Islands	Pakistan
Costa Rica	Luxembourg	Cape Verde	Poland
Curacao	Malta	Central African Rep.	
Dominican Republic	Monaco	Chad	Qatar
Equador	Netherlands	Commonwealth of Independent States	Romania
El Salvador	Norway		
French Guiana	Portugal	Congo	Saudi Arabia
Grenada	San Marino	Czechoslovakia	Senegal
Guatemala	Spain	Diego Garcia	Sierra Leone
Guyana	Sweden	Eqypt	South Africa
Haiti	Switzerland	Ethiopia	Sri Lanka
Honduras	Turkey	Gabon	Sudan
Jamaica	United Kingdom	Gambia	Swaziland
Martinique	Vatican	Ghana	Syria
Mexico	Yugoslavia	Gibraltar	Tanzania
Netherlands Antilles		Guinea	Togo
Nicaragua		Hungary	Tunisia
Panama		Iran	Uganda
Paraguay		Iraq	United Arab Emirates
Peru		Israel	
St. Lucia		Ivory Coast	
		Jordan	

Latin America

St. Vincent
Surinam
Trinidad & Tobago
Turks & Caicos Isles
Uruguay
Venezuela

Middle/Near East & Africa and Other Europe

Kenya
Kuwait
Lebanon
Lesotho
Liberia
Yemen
Zaire
Zambia
Zimbabwe

(B) Pacific Ocean Area

American Samoa
Australia
Brunei
Canada
China (Peoples Rep. of)
Christmas Is.
Cook Island
Ebeye
Fiji Islands
French Polynesia
Guam
Hong Kong
India
Indonesia
Japan
Kiribati
Korea
Kosrae
Majuro
Malaysia
Mariana Is.
Nauru
New Caledonia
New Guinea
New Zealand
Palau
Papua New Guinea
Philippines
Ponape
Saipan
Singapore
Solomon Is.
Sri Lanka
Taiwan
Thailand
Tonga
Truk
U.S. Mainland
Vanuatu
Vietnam
Western Samoa
Yap

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-344

In re Applications of

WILLIAM L. CARROLL File No. BPH-8808160A

Michael A. McMurray & Marilyn A. McMurray, A General Partnership, d/b/a/ McMURRAY COMMUNICATIONS File No. BPH-8808160I

For Construction Permit for a New FM Station on Channel 247A, Lebanon, Ohio

ORDER

Adopted: January 29, 1993; Released: February 5, 1993

By the Commission:

1. Before the Commission is an Application for Review of the Review Board's decision, *William L. Carroll*, 7 FCC Rcd 4469 (1992), filed by William L. Carroll (Carroll) on August 17, 1992, and an Opposition filed September 1, 1992, by McMurray Communications (McMurray). Having thoroughly reviewed the above pleadings, the record, and the Board's decision, we agree with the Board's disposition of this case and affirm its decision. Nevertheless, one matter warrants brief comment.

2. Carroll contends that the Board erred in assessing the applicants' broadcast experience because he is a 100% integrated owner with broadcast experience, whereas McMurray is only entitled to 50% credit for Mr. McMurray's broadcast experience (Mrs. McMurray, a 50% owner, has no such experience). In addition, Carroll contends that his experience, though less in duration than Mr. McMurrary's (9 years versus 26 years), is qualitatively superior since he has managed and overseen the overall operation of a broadcast station and Mr. McMurray has not.

3. There is no merit in Carroll's argument. Carroll's management experience has been since March 23, 1989, or after the filing of his application on August 16, 1988, 7 FCC Rcd at 1460 ¶ 22, and it is clear that enhancement activities commenced after the filing of the application are entitled to only minor enhancement credit. *Eugene Walton*, 7 FCC Rcd 3237, 3238 ¶ 12 (1992). In light of this circumstance and Mr. McMurray's extensive and lengthy broadcast experience, we agree with the Board that McMurray is to be preferred on broadcast experience, notwithstanding Carroll's 100% (versus McMurray's 50%) credit on this factor. In any event, even assuming arguendo that neither applicant was favored on broadcast experience, McMurray would still be entitled to a decisive overall integration preference based on the more significant residence/civic activity factor. *See, e.g. Kennelwood Broadcasting Company, Inc.*, 7 FCC Rcd 520 ¶ 5 (1992), and *Jerome Thomas Lamprecht*, 7 FCC Rcd ¶ 9 (1992). Ultimately, such a preference, as the Board correctly held, would clearly outweigh Carroll's comparative coverage advantage (be it very slight or slight) where the area already receives ample services. *See Naguabo Broadcasting Co.*, 7 FCC Rcd 1696, 1697 ¶ 8 (1992).

4. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. Section 1.115(g), the Application for Review filed on August 17, 1992, by William L. Carroll IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 29, 1993

CC Docket No. 92-166

MSS Above 1 GHz Negotiated Rulemaking Committee

Agency: Federal Communications Commission

Action: Notice of Cancellation of public meetings.

Summary: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons that the third meeting of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee") scheduled for Thursday, February 4, 1993 has been cancelled.

For additional information contact: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

Supplementary Information: Full Committee meetings are currently scheduled for Wednesday, February 10; Thursday, February 18; Thursday, February 25; Thursday, March 4; Tuesday, March 9; Thursday, March 18; Thursday, March 25; and Friday, April 2.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for:

The Bell Telephone Company of Pennsylvania
BellSouth Telecommunications, Inc.
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
GTE Florida Incorporated
GTE Hawaiian Telephone Company, Incorporated
Indiana Bell Telephone Company, Incorporated
Michigan Bell Telephone Company
New York Telephone Company
Southwestern Bell Telephone Company
U S West Communications, Inc.
United Telephone-Southeast, Inc.
Wisconsin Bell, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 1993; Released: January 15, 1993

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we prescribe depreciation rates and amortizations for thirteen local exchange carriers (LECs) that filed requests for such changes in 1992. We determined these depreciation rates and amortizations after considering the studies underlying the carriers' requests, staff analysis and recommendations, and the comments of the state commissions.

II. BACKGROUND

2. This Commission is required by the Communications Act of 1934 to prescribe the depreciation rates[1] that are used to compute depreciation expense for communications common carriers. In accordance with our rules, depreciation rates are prescribed so as to fully depreciate the carriers' investments on a straight-line basis over the life of their plant. In order to accomplish this we use the following formula:

$$\text{depreciation rate} = \frac{100\% - \text{accumulated depreciation } \% - \text{future net salvage } \%}{\text{average remaining life}}$$

Both the life and salvage factors are based upon estimates,[2] which require periodic review to ensure their reasonableness.

3. It is our practice to review and revise each carrier's depreciation rates and amortizations once every three years. In doing so, we review depreciation rates for approximately one-third of the larger carriers each year. Our review procedures are as follows: (a) carriers submit depreciation studies, which consist of a variety of data related to the carriers' recent plant retirements and plans for future plant retirements along with their preliminary rate proposals; (b) the Bureau independently analyzes carriers' data and proposals and prepares its own preliminary rate proposals[3], which are forwarded to the state commissions[4] and the carriers; (c) representatives from the Bureau, the state commissions and the carriers then meet to discuss the various proposals (i.e., the three-way meetings), and at the conclusion of these meetings, the Bureau makes its recommendations; (d) the carriers then formally file for revised depreciation rates that may or may not agree with the Bureau's proposals; and (e) the Bureau issues a Public Notice requesting comments on the proposed depreciation rate changes.

4. This year, in accordance with our triennial schedule, the thirteen carriers listed in the caption submitted full studies proposing revised depreciation rates and amortizations based upon revised estimates of the primary depreciation factors (*i.e.*, equipment service life, net salvage and retirement patterns). Following the procedures outlined above, the Bureau proposed rates and amortizations in a *Public Notice*[5] released August 12, 1992. Only the Virginia State Corporation Commission filed comments. No reply comments were filed.

---

[1] *See generally* 47 U.S.C § 220(b)(1982). In recent years, we have also prescribed amortization amounts in lieu of depreciation rates to resolve certain depreciation accounting problems. An amortization amount is a specific amount to be charged to depreciation expense each year. *See* Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, 3 FCC Rcd 984 (1988) (*Amortization Order*); *see also* The Prescription Percentages of Depreciation Pursuant to Section 220(b) of the Communications Act of 1934, as amended for: AT&T-Long Lines Department, 96 FCC 2d 257 (1983); The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for: AT&T Communications *et. al.*, 7 FCC Rcd 1050 (1992).

[2] Pursuant to our rules, the depreciation rate for an account is a function of life and salvage estimates and the book reserve ratio. *See* 47 C.F.R. Section 32.2000(g)(2)(ii).

[3] State commission staffs often provide preliminary rate proposals.

[4] This coordination is conducted pursuant to Section 220(i) of the Communications Act of 1934, as amended, 47 U.S.C § 220(i).

[5] Comments Invited On Depreciation Rate Prescriptions Proposed For Domestic Telephone Carriers, 7 FCC Rcd 5264 (1992) (*Public Notice*).

III. DISCUSSION

A. The Depreciation Rate Proposals

5. For all carriers except New York Telephone, all of the rates and amortizations recommended by the Bureau at the conclusion of the three-way meetings were requested by the carriers in their formal filings and were proposed by the Bureau in the *Public Notice*. We received no objections to the rates and amortizations proposed in the *Public Notice*.[6] We conclude, therefore, that the proposed depreciation rates and amortizations for all carriers except New York Telephone are consistent with the Commission's depreciation policies and are adequately supported by the carriers' underlying studies. Accordingly, we prescribe those rates and amortizations as shown in the Attachment to this *Order*.

6. In its July 31, 1992 filing, New York Telephone also requested the rates and amortizations recommended by the Bureau at the conclusion of the three-way meeting for 39 of its 43 accounts.[7] No objections were received regarding these rates and amortizations proposed for New York Telephone. We conclude, therefore, that the rates and amortizations for the 39 accounts agreed to by the carrier and the Bureau are consistent with the Commission's depreciation policies and are adequately supported by the carrier's underlying study.

7. For four accounts[8] , New York Telephone's filing was not consistent with the Bureau's recommendation. New York Telephone requested that these accounts be amortized over a five-year period rather than depreciated using the life and salvage factors agreed to at the three-way meeting. After evaluating New York Telephone's filing, the Bureau found that the carrier's proposal relied on procedures that were not consistent with those established by the Commission. Therefore, in the *Public Notice* the Bureau proposed depreciation rates based upon the life and salvage factors agreed to at the three-way meeting.

8. We must now decide whether to adopt the Bureau's proposal or the amortizations requested by New York Telephone. In comparing the effects of these proposals on New York Telephone's depreciation expense and reserve levels, we find that New York Telephone's proposal would result in an average annual depreciation expense of $1,372 million over the three-year represcription period, 1992 through 1994. This amount is less than the $1,380 million recorded by New York Telephone in 1991. The Bureau's proposal, on the other hand, would result in average annual depreciation expense of $1,463 million over the re-prescription period. Thus, New York Telephone's proposal would result in $273 million less depreciation expense, and a $273 million lower depreciation reserve, over the re-sprescription period than the Bureau's proposal.

9. We also find that the Bureau's proposal is based on the Commission's established procedures for determining depreciation represcriptions, while New York Telephone's proposal deviates from those procedures. Since 1981, the Commission has used procedures for the prescription of depreciation rates which were specifically designed to avoid problems of inadequate depreciation of plant.[9] Our remaining-life depreciation procedures adjust automatically for reserve imbalances caused by inadequate depreciation. New York Telephone's proposed amortization methodology is not only inconsistent with these procedures[10] , but would also result in a significant increase in New York Telephone's depreciation reserve deficiency. In its filing, New York Telephone claimed that it had a reserve deficiency in excess of $1 billion as of January 1, 1992. We find that it would not be appropriate to add to that deficiency by adopting New York Telephone's proposal, which would decrease the carrier's depreciation expense over the next three years. In view of the foregoing, we have decided to adopt the depreciation rates and amortizations proposed by the Bureau for all of New York Telephone's accounts as shown in the Attachment to this *Order*.

B. Submission of whole-Life Depreciation Parameters

10. In many of the depreciation prescription orders that the Commission has approved since its decision in *Property Depreciation*, the Commission has expressed its concern with the size of the carriers' depreciation reserve imbalances. Because of the rapid rate of technological advancement in the industry, we continue to believe that the carriers' reserve condition is extremely important. In order to adequately assess the reserve condition, it is necessary to consider the whole-life rates.[11] As a result, when carriers in this Order file for changes in depreciation rates, we require them to provide whole-life rates that are consistent with the proposed rates until notified to the contrary.

IV. CONCLUSION

11. Having considered the carriers' proposals, the studies upon which those proposals are based, the views and recommendations of the states, the response to the Public Notice, and the Bureau's studies and analyses, we adopt the depreciation rates, amortization amounts, and effective dates listed in the Appendix.

---

[6] The Virginia State Corporation Commission's comments urged that all rates be made effective coincident with the depreciation rate study date. All carriers listed in the caption filed for effective dates consistent with the depreciation rate study dates. These proposed effective dates are also consistent with our *Effective Date Reconsideration Order*, 7 FCC Rcd 798 (1992). Accordingly, we need not address this comment here.

[7] On November 10, 1992, New York Telephone filed an *ex parte* communication with this Commission correcting an error in its July 31 filing.

[8] The four accounts are Analog ESS, Trunk Aerial Cable, Trunk Underground Cable, and Trunk Buried Cable.

[9] *See* Amendment of Part 31 (Uniform Systems of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) (*Property Depreciation*); *recon.*, 87 FCC 2d 916 (1981); *Supplemental Opinion and Order*, 87 FCC 2d 1112 (1981).

[10] Although the Commission has used amortizations in the past to correct reserve imbalances and to recover costs over the last few years of dying accounts, we have not used amortizations to recover the costs for on-going accounts as New York Telephone proposes. The four accounts involved here do not meet the criteria for dying accounts because their balances are not rapidly diminishing and New York Telephone estimates a remaining life span of seven years for those accounts.

[11] Whole-life rates are calculated by dividing 100% less the average net salvage percentage by the average service life.

V. ORDERING CLAUSES

12. ACCORDINGLY IT IS ORDERED, pursuant to Sections 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 201-205 and 220(b), that the percentages of depreciation and amortization amounts set forth in the Appendix to this Order ARE PRESCRIBED, effective on the dates listed.

13. IT IS FURTHER ORDERED, that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	4.5	13	47.1	8.9
2113	AIRCRAFT	1.1	40	55.5	4.1
2115	GARAGE WORK EQUIP.	9.4	1	2.0	10.3
2116	OTHER WORK EQUIPMENT	9.6	1	31.1	7.1
2121	BUILDINGS	32.0	2	20.7	2.4
2122	FURNITURE	9.5	3	17.9	8.3
2123	OFF/COMP COMM EQUIP	6.1	1	34.9	10.5
2124	COMPUTERS	3.3	4	43.2	16.0
2211	ANALOG SWITCHING	3.9	0	35.6	16.5
2212	DIGITAL SWITCHING	10.5	5	22.6	6.9
2220	OPERATOR SYSTEMS	6.7	3	13.4	12.5
2231	RADIO SYSTEMS	3.5	0	36.5	18.1
2232	DDS CIR EQ	4.5	0	29.0	15.8
2232	DIGITAL CR EQ	6.2	1	30.2	11.1
2232	ANALOG CIR EQ	4.8	-3	49.1	11.2
2351	PUBLIC TELE EQUIP	6.1	2	50.5	7.8
2362	TERMINAL EQUIP.OTH	9.1	-2	9.0	10.2
2411	POLES	22.0	-84	45.7	6.3
2421	AERIAL CABLE	14.0	-16	38.3	5.6
2422	UNDERGROUND CABLE	15.5	0	28.2	4.6
2423	BURIED CABLE	15.4	-7	31.7	4.9
2424	SUBMARINE CABLE	7.2	-10	95.0	2.1
2426	INTRABUILDING CABLE	13.4	-41	41.4	7.4
2441	CONDUIT SYSTEMS	42.0	-10	22.9	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELLSOUTH TELECOMMUNICATIONS, INC. - FLORIDA

Effective January 1, 1992

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.8	14	72.4	3.6
2114 SPL PURPOSE VEHICLES	8.9	2	-81.3	20.1
2115 GARAGE WORK EQUIPMENT	8.5	2	-30.3	15.1
2116 OTHER WORK EQUIPMENT	8.2	2	39.9	7.1
2121 BUILDINGS	36.0	4	19.2	2.1
2122 FURNITURE	6.0	14	43.5	7.1
2123 OFFICE EQUIPMENT	4.1	18	21.3	14.8
2124 GEN'L PURPOSE COMPUTERS	3.0	0	51.5	16.2
2211 ANALOG ESS	4.3	0	51.7	11.2
2212 DIGITAL ESS	10.3	1	21.8	7.5
2220 OPERATOR SYSTEMS	8.7	0	8.9	10.5
2231 RADIO SYSTEMS	2.5	-5	102.0	1.2
2232 CIRCUIT-DDS	5.2	7	52.9	7.7
2232 CIRCUIT-OTHER	5.9	0	35.6	10.9
2311 STATION APPARATUS	4.9	1	69.3	6.1
2341 LARGE PBX	2.8	-4	71.6	11.6
2351 PUBLIC TELEPHONE	3.0	20	70.4	3.2
2362 OTHER TERMINAL EQUIPMENT	3.0	-4	79.6	8.1
2411 POLES	21.0	-54	49.0	5.0
2421 AERIAL CABLE FIBER	16.3	-12	-15.5	7.8
2421 AERIAL CABLE METAL	11.1	-11	50.5	5.5
2422 UNDERGROUND CABLE FIBER	16.9	-6	23.1	4.9
2422 UNDERGROUND CABLE METAL	14.1	-4	39.7	4.6
2423 BURIED CABLE FIBER	16.1	0	4.2	6.0
2423 BURIED CABLE METAL	11.2	-11	45.3	5.9
2424 SUBMARINE CABLE	12.2	-5	55.5	4.1
2426 INTRA-BLDG NETWK CABLE	12.3	-12	50.2	5.0
2431 AERIAL WIRE	6.5	-26	108.4	2.7
2441 CONDUIT SYSTEM	41.0	-7	23.5	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELLSOUTH TELECOMMUNICATIONS, INC. - GEORGIA

Effective January 1, 1992

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.1	21	56.3	5.5
2113 AIRCRAFT	6.5	60	26.7	2.0
2114 SPL PURPOSE VEHICLES	7.4	1	38.4	8.2
2115 GARAGE WORK EQUIPMENT	8.7	1	-58.9	18.1
2116 OTHER WORK EQUIPMENT	7.9	1	42.7	7.1
2121 BUILDINGS	29.0	4	26.3	2.4
2122 FURNITURE	6.7	14	41.8	6.6
2123 OFFICE EQUIPMENT	6.2	18	27.5	8.8
2124 GEN'L PURPOSE COMPUTERS	2.9	0	56.6	15.0
2211 ANALOG ESS	5.2	0	55.7	8.5
2212 DIGITAL ESS	10.3	1	23.0	7.4
2220 OPERATOR SYSTEMS	9.8	1	-1.1	10.2
2231 RADIO SYSTEMS	4.0	-5	75.4	7.4
2232 CIRCUIT-DDS	5.8	5	32.7	10.7
2232 CIRCUIT-OTHER	5.6	0	33.6	11.9
2311 STATION APPARATUS	7.5	0	13.8	11.5
2341 LARGE PBX	2.7	-4	69.2	12.9
2351 PUBLIC TELEPHONE	3.2	20	57.3	7.1
2362 OTHER TERMINAL EQUIPMENT	4.2	-4	77.9	6.2
2411 POLES	17.7	-38	34.9	5.8
2421 AERIAL CABLE FIBER	14.6	-14	18.8	6.5
2421 AERIAL CABLE METAL	11.1	-13	44.5	6.2
2422 UNDERGROUND CABLE FIBER	17.9	-8	21.9	4.8
2422 UNDERGROUND CABLE METAL	13.6	-10	41.6	5.0
2423 BURIED CABLE FIBER	16.1	-2	21.9	5.0
2423 BURIED CABLE METAL	11.3	-6	37.4	6.1
2424 SUBMARINE CABLE	11.5	-9	56.6	4.6
2426 INTRA-BLDG NETWK CABLE	11.2	-16	48.2	6.1
2431 AERIAL WIRE	8.3	-68	130.1	4.6
2441 CONDUIT SYSTEM	46.0	-12	17.9	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELLSOUTH TELECOMMUNICATIONS, INC. - NORTH CAROLINA

Effective January 1, 1992

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.6	15	59.0	7.2
2115 GARAGE WORK EQUIPMENT	7.2	1	-14.0	15.7
2116 OTHER WORK EQUIPMENT	7.7	1	42.8	7.3
2121 BUILDINGS	31.0	3	23.3	2.4
2122 FURNITURE	5.8	14	39.2	8.1
2123 OFFICE EQUIPMENT	6.0	19	41.1	6.7
2124 GEN'L PURPOSE COMPUTERS	3.3	0	48.4	15.6
2211 ANALOG ESS	4.9	0	40.3	12.2
2212 DIGITAL ESS	10.2	1	23.6	7.4
2220 OPERATOR SYSTEMS	9.8	1	16.3	8.4
2231 RADIO SYSTEMS	3.1	-1	91.7	3.0
2232 CIRCUIT-DDS	6.4	1	1.9	15.2
2232 CIRCUIT-OTHER	5.3	0	39.6	11.4
2311 STATION APPARATUS	10.0	1	-15.4	11.4
2341 LARGE PBX	2.8	0	55.6	15.9
2351 PUBLIC TELEPHONE	2.5	20	68.3	4.7
2362 OTHER TERMINAL EQUIPMENT	4.2	-4	67.6	8.7
2411 POLES	18.9	-52	39.6	5.9
2421 AERIAL CABLE FIBER	14.9	-14	18.0	6.4
2421 AERIAL CABLE METAL	11.0	-13	45.1	6.2
2422 UNDERGROUND CABLE FIBER	21.0	-9	20.3	4.2
2422 UNDERGROUND CABLE METAL	13.7	-12	41.7	5.1
2423 BURIED CABLE FIBER	16.3	0	14.3	5.3
2423 BURIED CABLE METAL	11.4	-7	37.7	6.1
2424 SUBMARINE CABLE	11.1	-3	46.0	5.1
2426 INTRA-BLDG NETWK CABLE	11.5	-7	48.7	5.1
2431 AERIAL WIRE	6.3	-63	145.5	2.8
2441 CONDUIT SYSTEM	46.0	-9	20.3	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELLSOUTH TELECOMMUNICATIONS, INC. - SOUTH CAROLINA

Effective January 1, 1992

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.5	17	58.0	5.6
2115 GARAGE WORK EQUIPMENT	8.6	1	-77.6	20.5
2116 OTHER WORK EQUIPMENT	8.0	1	44.8	6.8
2121 BUILDINGS	28.0	4	28.0	2.4
2122 FURNITURE	6.9	14	23.4	9.1
2123 OFFICE EQUIPMENT	6.5	18	15.1	10.3
2124 GEN'L PURPOSE COMPUTERS	2.8	3	45.8	18.3
2211 ANALOG ESS	3.5	0	19.1	23.1
2212 DIGITAL ESS	10.3	5	21.3	7.2
2220 OPERATOR SYSTEMS	9.6	1	13.9	8.9
2231 RADIO SYSTEMS	3.9	-7	69.0	9.7
2232 CIRCUIT-DDS	5.5	7	17.8	13.7
2232 CIRCUIT-OTHER	5.3	1	38.2	11.5
2311 STATION APPARATUS	8.3	2	65.0	4.0
2341 LARGE PBX	2.1	0	77.5	10.7
2351 PUBLIC TELEPHONE	2.7	20	72.4	2.8
2362 OTHER TERMINAL EQUIPMENT	3.8	-4	71.7	8.5
2411 POLES	22.0	-58	31.3	5.8
2421 AERIAL CABLE FIBER	14.4	-14	20.1	6.5
2421 AERIAL CABLE METAL	10.9	-11	48.5	5.7
2422 UNDERGROUND CABLE FIBER	19.6	-8	22.9	4.3
2422 UNDERGROUND CABLE METAL	13.9	-13	43.8	5.0
2423 BURIED CABLE FIBER	17.2	0	18.3	4.8
2423 BURIED CABLE METAL	11.5	-8	36.8	6.2
2424 SUBMARINE CABLE	11.3	-1	28.7	6.4
2426 INTRA-BLDG NETWK CABLE	12.5	-13	43.3	5.6
2431 AERIAL WIRE	2.7	-62	136.8	9.3
2441 CONDUIT SYSTEMS	46.0	-8	20.8	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	3.2	17	54.0	9.1
2115	GARAGE WORK EQ	6.3	6	29.8	10.2
2116	OTHER WORK EQ.	8.0	6	36.3	7.2
2121	BUILDINGS	28.0	10	14.7	2.7
2122	FURNITURE	7.8	19	24.2	7.3
2123	OFC SUPPORT	6.1	15	22.0	10.3
2123	COMPANY COMM.	5.5	0	24.9	13.7
2124	COMPUTERS	3.1	10	48.2	13.5
2211	ANALOG SWITCH.	3.5	0	46.2	15.4
2212	DIGITAL SWITCH	10.3	3	19.8	7.5
2212	CUST. PREMISE	6.4	25	51.7	3.6
2220	OPER SYS DIG	7.0	3	20.5	10.9
2220	OP SYS ANALOG	0.9	0	64.0	40.0
2231	RADIO SYSTEMS	8.6	-3	43.0	7.0
2232	DDS CKT.	7.1	-4	52.7	7.2
2232	DIGITAL CKT.	7.2	1	32.2	9.3
2232	ANALOG CKT.	5.6	0	36.9	11.3
2351	PUBLIC TELE.	5.5	0	58.8	7.5
2362	TEL. & MISC.	3.1	3	90.9	2.0
2362	OTHER TERM.	5.7	-5	44.9	10.5
2411	POLES	18.9	-115	98.3	6.2
2421	AERIAL CABLE	11.9	-8	57.9	4.2
2422	UNDERGROUND CA.	16.8	-11	53.7	3.4
2423	BURIED CABLE	16.3	-7	39.5	4.1
2424	SUBMARINE CABLE	5.0	-3	90.9	2.4
2426	INTRABLDG CABLE	11.6	-12	48.1	5.5
2441	CONDUIT SYSTEMS	34.0	-10	39.4	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	4.1	13	45.3	10.2
2115	GARAGE WORK EQUIP	8.7	4	32.5	7.3
2116	OTHER WORK EQUIPMENT	10.5	4	27.1	6.6
2121	BUILDINGS	28.0	8	19.5	2.6
2122	FURNITURE	12.1	10	10.9	6.5
2123	COMPANY COMM EQUIP	5.6	5	52.9	7.5
2123	OFFICE SUPPORT EQUIP	5.5	8	31.2	11.1
2124	COMPUTERS	3.7	10	37.4	14.2
2211	ANALOG SWITCHING	3.2	0	31.6	21.4
2212	DIGITAL SWITCHING	10.6	5	23.2	6.8
2220	OP SYS-XBAR/ANALOG	1.2	0	87.9	10.1
2220	OPER SYS - DIG SW.	6.6	5	21.7	11.1
2231	RADIO SYSTEMS	8.2	0	14.7	10.4
2232	ANALOG CIRCUIT EQUIP	5.0	-3	48.2	11.0
2232	DIGITAL CIRCUIT EQ	6.5	1	30.7	10.5
2232	DIGITAL DATA SYSTEMS	3.4	1	-2.6	29.9
2351	PUBLIC TELEPHONES	4.6	5	61.9	7.2
2362	OTHER TERM EQUIP	5.8	-7	47.6	10.2
2362	TELEPHONE & MISC	3.7	0	87.1	3.5
2411	POLES	18.7	-56	39.6	6.2
2421	AERIAL CABLE	13.6	-12	43.2	5.1
2422	U.G. CABLE	16.3	-8	45.6	3.8
2423	BURIED CABLE	16.5	-3	31.7	4.3
2424	SUBMARINE CABLE	13.3	-1	44.0	4.3
2426	INTRABUILDING CABLE	11.6	-15	61.7	4.6
2441	CONDUIT SYSTEMS	45.0	-7	19.8	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE FLORIDA INCORPORATED

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	4.1	18	19.3	15.3
2115	GARAGE WORK EQUIPMENT	8.5	0	35.1	7.6
2116	OTHER WORK EQUIPMENT	8.4	1	40.1	7.0
2121	BUILDINGS	26.0	0	23.5	2.9
2122	FURNITURE	8.2	9	41.8	6.0
2123	OFFICE SUPPORT EQ	5.7	8	51.8	7.1
2123	COMPANY COMM EQUIPMENT	5.0	24	53.8	4.4
2124	GENERAL PURP COMPUTERS	3.0	3	52.9	14.7
2211	ANALOG SWITCHING	2.8	-1	-6.3	38.3
2212	DIGITAL SWITCHING	10.2	3	24.4	7.1
2220	OPERATOR SYSTEMS	6.9	0	-8.9	15.8
2231	RADIO SYSTEMS	3.2	0	13.4	27.1
2232	CIRCUIT EQUIPMENT	5.0	6	10.0	16.8
2351	PUBLIC TEL TERM EQ	3.0	5	85.2	3.3
2362	OTHER TERMINAL EQ	4.7	-3	44.9	12.4
2411	POLE LINES	13.3	-87	58.5	9.7
2421	AERIAL CABLE METALLIC	11.2	-37	38.6	8.8
2421	AERIAL CABLE NON METAL	15.8	-24	17.5	6.7
2422	UNDERGRD CABLE METAL	14.6	-14	25.4	6.1
2422	UNDERGRD CABLE NONMET	16.5	-9	7.5	6.2
2423	BURIED CABLE METALLIC	13.6	-3	23.1	5.9
2423	BURIED CABLE NONMETAL	16.8	-3	9.9	5.5
2424	SUBMARINE CABLE METAL	11.5	-1	46.4	4.7
2424	SUBMARINE CA NONMETAL	17.4	-1	20.6	4.6
2426	INTRABLDG CABLE METAL	11.3	-10	43.9	5.8
2426	INTRABLDG CA NONMETAL	15.9	-5	6.6	6.2
2431	AERIAL WIRE	5.9	-7	-215.2	54.6
2441	CONDUIT	42.0	-19	19.4	2.4

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE HAWAIIAN TELEPHONE COMPANY, INCORPORATED

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	5.2	9	33.3	11.1
2115	GARAGE WORK EQUIPMENT	8.7	0	36.1	7.3
2116	OTHER WORK EQUIPMENT	6.7	5	22.6	10.8
2121	BUILDINGS	30.0	-3	22.1	2.7
2122	FURNITURE	11.1	4	45.0	4.6
2123	OFFICE SUPPORT EQ.	5.2	4	61.0	6.7
2123	COMPANY COMMUN. EQ.	4.9	4	69.9	5.3
2124	COMPUTERS	3.8	5	42.7	13.8
2211	ANALOG ELECTRONIC SW	6.4	-3	71.2	5.0
2212	DIGITAL ELECTRONIC SW	9.7	0	34.5	6.8
2215	ELECTROMECHANICAL COMB	3.5	-6	102.8	0.9
2220	OPERATOR SYSTEMS	10.7	-6	35.7	6.6
2231	RADIO SYSTEMS	6.9	-1	53.6	6.9
2232	CIRCUIT EQUIPMENT	6.6	5	41.9	8.0
2232	CIRCUIT TRANSPACIFIC	6.2	0	52.2	7.7
2351	PUBLIC TELE TERM EQ.	4.9	5	74.1	4.3
2362	OTHER TERMINAL EQ.	6.0	0	50.2	8.3
2411	POLES	19.4	-55	33.2	6.3
2421	AERIAL CABLE	16.5	-31	30.0	6.1
2422	UNDERGROUND CABLE	16.7	-25	26.7	5.9
2423	BURIED CABLE	17.4	-10	23.5	5.0
2424	SUBMARINE CABLE	7.5	-1	66.6	4.6
2425	DEEP SEA CABLE	9.4	-1	34.7	7.1
2426	INTRABLDG NETWORK CABL	14.6	-15	43.8	4.9
2431	AERIAL WIRE	6.2	-31	71.7	9.6
2441	CONDUIT SYSTEMS	38.0	-15	21.6	2.5

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
INDIANA BELL TELEPHONE COMPANY, INCORPORATED

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	4.0	15	49.8	8.8
2115	GARAGE WORK EQUIPMENT	8.2	3	24.5	8.8
2116	OTHER WORK EQUIPMENT	7.7	3	46.5	6.6
2121	BUILDINGS	26.0	5	24.4	2.7
2122	FURNITURE	11.9	5	17.5	6.5
2123	OFFICE SUPPORT EQ	6.7	5	26.4	10.2
2123	COMPANY COMM EQ	4.8	-6	40.5	13.6
2124	GEN PURPOSE COMPUTERS	2.6	3	72.0	9.6
2211	ANALOG ELEC SWITCHING	4.3	0	48.0	12.1
2212	DIGITAL ELEC SWITCHING	10.6	3	24.8	6.8
2220	OPERATOR SYSTEMS	8.4	-1	-6.1	12.8
2232	DIGITAL DATA SERVICES	5.5	0	28.4	13.0
2232	DIGITAL CIRCUIT	5.3	0	45.3	10.3
2232	ANALOG CIRCUIT	3.7	-2	57.9	11.9
2351	PUBLIC TEL TERM EQ	---	3	97.0	5.0
2362	OTHER TERM EQ	3.6	-3	49.8	14.8
2411	POLES	15.6	-78	70.1	6.9
2421	AERIAL CABLE	13.1	-25	44.0	6.2
2422	UG CABLE-NONMETALLIC	15.3	-20	22.3	6.4
2422	UG CABLE-METALLIC	16.4	-12	42.1	4.3
2423	BUR CABLE-NONMETALLIC	18.8	-9	25.2	4.5
2423	BUR CABLE-METALLIC	13.1	-9	38.0	5.4
2424	SUBMARINE CABLE	8.2	-1	73.4	3.4
2426	INTRABUILDING CABLE	11.4	2	34.3	5.6
2431	AERIAL WIRE	5.9	-46	76.1	11.8
2441	CONDUIT SYSTEMS	44.0	-10	26.1	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
MICHIGAN BELL TELEPHONE COMPANY

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES		1.0	15	51.7	33.3	0
2115	GARAGE WORK EQUIPMENT		8.0	-10	-2.4	14.1	-4
2116	OTHER WORK EQUIPMENT		8.5	4	32.7	7.4	-44
2121	BUILDINGS		30.0	8	22.9	2.3	-643
2122	FURNITURE		9.0	3	23.9	8.1	-134
2123	OFFICE SUPPORT EQ		6.6	3	58.8	5.8	-106
2123	COMPANY COMM EQ		3.7	3	52.4	12.1	0
2124	GEN PURPOSE COMPUTERS		2.9	3	59.0	13.1	0
2211	ANALOG ELEC SWITCHING		3.7	0	51.4	13.1	14768
2212	DIGITAL ELEC SWITCHING		10.7	1	21.1	7.3	23
2215	STEP BY STEP SWITCHING	@	---	0	80.7	---	---
2215	CROSSBAR SWITCHING	*	---	0	86.3	---	---
2220	OPERATOR SYSTEMS		6.5	3	25.9	10.9	162
2231	RADIO SYSTEMS		5.9	1	61.2	6.4	-576
2232	DIGITAL DATA SERVICES		4.6	0	52.4	10.3	81
2232	DIGITAL CIRCUIT		6.4	2	38.6	9.3	2855
2232	ANALOG CIRCUIT		3.8	-3	52.1	13.4	1782
2351	PUBLIC TEL TERM EQ		5.0	1	64.0	7.0	0
2362	OTHER TERM EQ		5.7	8	62.1	5.2	0
2411	POLES		16.2	-61	69.9	5.6	1033
2421	AERIAL CABLE		9.4	-15	58.8	6.0	11907
2422	UG CABLE-NONMETALLIC		17.9	-12	19.9	5.1	333
2422	UG CABLE-METALLIC		16.3	-19	39.3	4.9	4216
2423	BUR CABLE-NONMETALLIC		22.0	-3	16.2	3.9	433
2423	BUR CABLE-METALLIC		14.1	-3	39.8	4.5	14637
2424	SUBMARINE CABLE NONMETALLIC		18.3	-5	-11.2	6.3	0
2424	SUBMARINE CABLE METAL		11.5	-3	64.7	3.3	7
2426	INTRABUILDING CABLE		10.8	5	39.8	5.1	166
2431	AERIAL WIRE		1.3	-80	165.2	11.4	0
2441	CONDUIT SYSTEMS		42.0	-10	25.7	2.0	1889

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14. released January 21, 1988, as amended by memorandum Opinion and Order AAD 8-1917.

@ The net service value for the Step-by-Step Switching Account is to be amortized over an eighteen month period ending June 30, 1993.

* The net service value for the Crossbar Switching Account is to be amortized over a six month period ending June 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW YORK TELEPHONE COMPANY

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	1.1	2	86.4	10.5
2114	SPEC PURPOSE VEHICLES	7.6	5	49.2	6.0
2115	GARAGE WORK EQUIPMENT	8.3	5	21.0	8.9
2116	OTHER WORK EQUIPMENT	12.4	0	41.8	4.7
2121	BUILDING FIXTURES	11.1	-4	22.1	7.4
2121	BUILDINGS	37.0	-1	19.7	2.2
2122	FURNITURE	9.3	0	51.4	5.2
2123	OFFICE EQUIPMENT	6.2	0	19.1	13.0
2123	OFFICIAL COMM EQPT	3.2	-2	80.2	6.8
2124	GENL PURP COMPUTERS	2.1	0	79.7	9.7
2211	ELECT SWITCH ANALOG	3.1	-2	50.2	16.7
2212	ELECT SWITCH DIGITAL	10.5	2	24.8	7.0
2215	ELECTROMECH CROSSBAR	0.5	-5	94.9	20.2
2215	ELECTROMECH XBAR ADJ @	---	-5	5.2	---
2215	ELECTROMECHANICAL SXS	---	-8	108.0	5.0
2220	OPERATOR SYSTEMS	4.4	-1	56.5	10.1
2231	RADIO SYSTEMS	7.4	-4	54.6	6.7
2232	CIRCUIT DDS	5.3	-5	53.1	9.8
2232	CIRCUIT OTHER	5.1	-5	39.9	12.8
2311	STATION APPARATUS	3.2	3	80.8	5.1
2351	PUBLIC TELEPHONE	3.5	0	91.7	2.4
2362	OTH TERM EQPT NCPE	2.7	0	45.0	20.4
2411	POLE LINES	24.0	-113	58.1	6.5
2421	SUBR AER BLDG-NON MET	14.9	-11	10.5	6.7
2421	SUBR AER CBL-BLDG MET	11.0	-21	41.6	7.2
2421	SUBR AER CBL-OTH MET	14.9	-37	46.3	6.1
2421	SUBR AER OTH-NON MET	18.8	-11	11.2	5.3
2421	TRK AER CBL-NON METAL	19.7	-12	14.1	5.0
2422	SUBR UG CBL-METALLIC	16.9	-30	42.6	5.2
2422	SUBR UG CBL-NON METAL	17.9	-25	13.3	6.2
2422	TRK AER CBL-METALLIC	3.7	-14	44.8	18.7
2422	TRK UG CBL-METALLIC	3.5	-17	51.7	18.7
2422	TRK UG CBL-NMETAL MM	5.8	-9	25.4	14.4
2422	TRK UG CBL-NMETAL SM	16.5	-12	11.0	6.1
2423	SUBR BUR CBL METALLIC	16.8	-8	36.2	4.3
2423	SUBR BUR CBL-NON MET	21.0	-5	7.1	4.7
2423	TRK BUR CBL-METALLIC	3.6	-4	60.9	12.0
2423	TRK BUR CBL-NON METAL	23.0	-8	11.6	4.2
2424	SUBM CBL-METALLIC	16.8	-10	58.8	3.0
2424	SUBM CBL-NON METALLIC	16.3	-10	22.9	5.3
2431	AERIAL WIRE	5.5	-29	70.4	10.7
2441	U G CONDUIT MAIN	47.0	-20	27.7	2.0
2441	U G CONDUIT SUBS	39.0	-12	22.1	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

@ The amortization amount for the Crossbar Adjunct Account ordered in FCC 90-44, released January 31, 1990, is continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - ARKANSAS

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		4.6	9	35.9	12.0
2115	GARAGE WORK EQT		8.9	1	-223.7	36.3
2116	OTHER WORK EQT		9.0	1	37.1	6.9
2121	BUILDINGS		31.0	4	23.4	2.3
2122	FURNITURE		---	1	99.0	5.0
2123	OFF. EQT-OFFICE SUPPORT		6.4	2	38.1	9.4
2123	OFF. EQT-OFFICE COM EQT		4.4	6	49.9	10.0
2124	GENL. PURP. COMPUTERS		3.2	8	60.2	9.9
2210	ANALOG ELECT SWITCH		5.8	-1	50.2	8.8
2210	CROSSBAR	#	---	-2	61.3	---
2210	DIGITAL ELECT SWITCH		10.9	5	21.6	6.7
2210	STEP-BY-STEP	@	---	-1	64.8	---
2220	OPERATOR SYSTEMS		3.8	0	69.1	8.1
2230	ANALOG CIRCUIT-OTH		4.5	-4	37.6	14.8
2230	DIGITAL CIRCUIT-OTH		6.8	0	33.3	9.8
2230	DIGITAL DATA SYSTEMS		3.7	0	7.7	24.9
2230	RADIO		8.6	5	34.4	7.0
2311	STATION APPARATUS		2.6	-2	62.7	15.1
2341	LPBX		5.7	-2	27.3	13.1
2351	PUBLIC TELEPHONE		3.8	0	77.2	6.0
2362	OTHER TERMINAL EQUIP		4.2	0	61.1	9.3
2411	POLES		18.0	-82	67.8	6.3
2421	AERIAL CABLE-EXCH		14.8	-50	72.4	5.2
2421	AERIAL CABLE-TOLL		2.5	-23	32.6	36.2
2422	UG CABLE-EXCH FIBER		22.0	-10	17.4	4.2
2422	UG CABLE-EXCH METAL		17.0	-39	43.9	5.6
2422	UG CABLE-TOLL FIBER		16.4	-10	25.5	5.2
2422	UG CABLE-TOLL METAL		5.7	-22	74.7	8.3
2423	BURIED CABLE-EXCH MET		14.6	-6	46.8	4.1
2423	BURIED CABLE-TOLL MET		6.9	-3	42.2	8.8
2423	BURIED CA-EXCH FIBER		19.7	-6	11.2	4.8
2423	BURIED CA-TOLL FIBER		16.4	-6	15.3	5.5
2424	SUBMARINE CABLE		10.8	-5	35.5	6.4
2426	INTRABLDG NTWK CABLE		11.2	-6	70.2	3.2
2431	AERIAL WIRE-EXCH		---	-50	150.0	5.0
2441	CONDUIT SYSTEMS		43.0	-6	26.3	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

The net service value for the Crossbar Account is to be amortized over a twenty-four month period ending in December 31, 1993.

@ The net service value for the Step-by-Step Account is to be amortized over a forty-eight month period ending December 31, 1995.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - KANSAS

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		4.0	12	47.9	10.0
2115	GARAGE WORK EQT		8.0	3	-175.0	34.0
2116	OTHER WORK EQT		9.1	3	40.1	6.3
2121	BUILDINGS		27.0	6	26.1	2.5
2122	FURNITURE		17.8	6	33.8	3.4
2123	OFF. EQT-OFFICE SUPPORT		6.8	1	23.6	11.1
2123	OFF. EQT-OFFICE COM EQT		5.2	1	58.4	7.8
2124	GENL. PURP. COMPUTERS		3.6	6	64.3	8.3
2210	ANALOG ELECT SWITCH		5.7	0	51.5	8.5
2210	CROSSBAR	#	---	-5	-32.6	---
2210	DIGITAL ELECT SWITCH		10.7	5	21.1	6.9
2210	STEP-BY-STEP	@	---	-5	50.0	---
2220	OPERATOR SYSTEMS		4.6	0	43.6	12.3
2230	ANALOG CIRCUIT-OTH		6.0	-4	47.4	9.4
2230	DIGITAL CIRCUIT-OTH		6.9	1	31.1	9.8
2230	DIGITAL DATA SYSTEMS		3.6	0	16.0	23.3
2230	RADIO		9.1	5	49.1	5.0
2311	STATION APPARATUS		7.2	-2	71.9	4.2
2341	LPBX		4.6	-2	73.9	6.1
2351	PUBLIC TELEPHONE		6.6	3	51.9	6.8
2362	OTHER TERMINAL EQUIP		5.4	-2	47.3	10.1
2411	POLES		11.4	-79	90.8	7.7
2421	AERIAL CABLE-EXCH		13.1	-21	49.8	5.4
2421	AERIAL CABLE-TOLL	*	---	-7	-173.3	---
2422	U G CABLE-EXCH FIBER		19.1	-10	19.0	4.8
2422	U G CABLE-EXCH METAL		16.3	-24	50.2	4.5
2422	U G CABLE-TOLL FIBER		14.0	-10	20.3	6.4
2422	U G CABLE-TOLL METAL		6.2	-19	50.0	11.1
2423	BURIED CABLE-EXCH MET		13.4	-5	43.6	4.6
2423	BURIED CABLE-TOLL MET		7.1	-1	38.6	8.8
2423	BURIED CA-EXCH FOBER		21.0	-6	12.8	4.4
2423	BURIED CA-TOLL FIBER		16.7	-6	14.6	5.5
2424	SUBMARINE CABLE		11.7	0	68.5	2.7
2426	INTRABLDG NTWK CABLE		13.6	-17	45.7	5.2
2431	AERIAL WIRE-EXCH		3.6	-57	113.5	12.1
2441	CONDUIT SYSTEMS		48.0	-6	24.5	1.7

The figures in Columns B, C, and D are percentages of gross book cost.

The net service value for the Crossbar Account is to be amortized over a twelve month period ending December 31, 1992.

@ The net service value for the Step-by-Step Acount is to be amortized over a forty-two month period ending June 30, 1995.

* The net service value for the Aerial Cable-Toll Account is to be amortized over a forty-eight month period ending December 31, 1995.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - MISSOURI

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		4.1	11	48.8	9.8
2115	GARAGE WORK EQT		8.1	5	-100.9	24.2
2116	OTHER WORK EQT		9.9	2	43.0	5.6
2121	BUILDINGS		38.0	4	22.8	1.9
2122	FURNITURE		13.6	7	-18.8	8.2
2123	OFF. EQT-OFFICE SUPPORT		8.1	0	21.9	9.6
2123	OFF. EQT-OFFICE COM EQT		5.3	18	35.9	8.7
2124	GENL. PURP. COMPUTERS		3.5	8	40.4	14.7
2210	ANALOG ELECT SWITCH		7.9	3	51.5	5.8
2210	CROSSBAR	#	---	-4	-187.1	---
2210	DIGITAL ELECT SWITCH		10.8	10	19.2	6.6
2210	STEP-BY-STEP	@	---	-3	53.4	---
2220	OPERATOR SYSTEMS		9.3	3	13.2	9.0
2230	ANALOG CIRCUIT-OTH		5.7	-2	39.3	11.0
2230	DIGITAL CIRCUIT-OTH		6.7	1	26.1	10.9
2230	DIGITAL DATA SYSTEMS		3.5	0	11.3	25.3
2230	RADIO		8.8	10	24.8	7.4
2311	STATION APPARATUS		4.2	-2	70.7	7.5
2341	LPBX		5.8	6	28.7	11.3
2351	PUBLIC TELEPHONE		8.1	15	58.4	3.3
2362	OTHER TERMINAL EQUIP		5.2	1	45.7	10.3
2411	POLES		22.0	-100	68.3	6.0
2421	AERIAL CABLE-EXCH		15.8	-30	50.9	5.0
2421	AERIAL CABLE-TOLL		2.6	-9	66.8	16.2
2422	UG CABLE-EXCH FIBER		21.0	-5	17.4	4.2
2422	UG CABLE-EXCH METAL		16.9	-25	47.0	4.6
2422	UG CABLE-TOLL FIBER		16.1	-8	22.1	5.3
2422	UG CABLE-TOLL METAL		6.4	6	35.5	9.1
2423	BURIED CABLE-EXCH MET		17.5	-10	35.4	4.3
2423	BURIED CABLE-TOLL MET		7.4	-1	31.9	9.3
2423	BURIED CA-EXCH FIBER		22.0	-5	14.7	4.1
2423	BURIED CA-TOLL FIBER		16.7	-5	10.7	5.6
2424	SUBMARINE CABLE		11.9	1	34.6	5.4
2426	INTRABLDG NTWK CABLE		19.7	-17	31.7	4.3
2431	AERIAL WIRE-EXCH		5.4	-139	156.6	15.3
2441	CONDUIT SYSTEMS		47.0	-6	25.1	1.7

The figures in Columns B, C, and D are percentages of gross book cost.

The net service value for the Crossbar Account is to be amortized over a twelve month period ending December 31, 1992.

@ The net service value for the Step-by-Step Account is to be amortized over a twenty-four month period ending December 31, 1993.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - OKLAHOMA

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	3.9	13	40.7	11.9
2115	GARAGE WORK EQT	7.9	0	24.3	9.6
2116	OTHER WORK EQT	9.2	0	45.4	5.9
2121	BUILDINGS	27.0	3	33.4	2.4
2122	FURNITURE	15.9	7	11.3	5.1
2123	OFF. EQT-OFFICE SUPPORT	6.3	0	17.2	13.1
2123	OFF. EQT-OFFICE COM EQT	4.0	2	71.7	6.6
2124	GEN'L PURPOSE COMPUTERS	3.4	3	53.3	12.9
2210	ANALOG ELECT SWITCHING	7.2	-1	42.9	8.1
2210	CROSSBAR	5.5	-2	21.8	14.6
2210	DIGITAL ELECT SWITCHING	10.6	5	19.9	7.1
2210	STEP-BY-STEP	6.5	-8	58.5	7.6
2220	OPERATOR SYSTEMS	4.9	1	31.8	13.7
2231	RADIO	9.8	5	47.5	4.8
2232	ANALOG CIRCUIT	5.4	-4	66.6	6.9
2232	DIGITAL CIRCUIT	7.7	0	35.5	8.4
2232	DIGITAL DATA SYSTEMS	4.7	0	48.5	11.0
2311	STATION APPARATUS	5.0	1	43.2	11.2
2341	LPBX	5.5	-2	35.4	12.1
2351	PUBLIC TELEPHONE	5.7	1	55.1	7.7
2362	OTHER TERMINAL	5.0	-2	61.4	8.1
2411	POLES	15.1	-138	98.8	9.2
2421	AERIAL CABLE-EXCH	14.3	-45	66.6	5.5
2421	AERIAL CABLE-TOLL	3.2	-46	105.7	12.6
2422	UG CABLE-EXCH FIBER	19.2	-10	17.0	4.8
2422	UG CABLE-EXCH METAL	16.3	-25	47.5	4.8
2422	UG CABLE-TOLL FIBER	14.4	-10	26.5	5.8
2422	UG CABLE-TOLL METAL	7.9	-17	61.1	7.1
2423	BURIED CABLE-EXCH MET	13.1	-6	46.0	4.6
2423	BURIED CABLE-TOLL MET	8.1	-1	55.5	5.6
2423	BURIED CA-EXCH FIBER	21.0	-6	7.1	4.7
2423	BURIED CA-TOLL FIBER	16.6	-6	13.3	5.6
2424	SUBMARINE CABLE	13.1	-8	76.8	2.4
2426	INTRABLDG NTWK CABLE	14.4	-17	75.5	2.9
2431	AERIAL WIRE-EXCH	5.5	-146	149.1	17.6
2441	CONDUIT SYSTEMS	50.0	-6	21.3	1.7

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - TEXAS

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	4.0	11	47.0	10.5
2115	GARAGE WORK EQT	7.1	5	12.1	11.7
2116	OTHER WORK EQT	9.1	5	41.6	5.9
2121	BUILDINGS	33.0	4	24.0	2.2
2122	FURNITURE	14.1	4	78.4	1.2
2123	OFF. EQT-OFFICE SUPPORT	5.9	2	17.7	13.6
2123	OFF. EQT-OFFICE COM EQT	4.2	1	56.8	10.0
2124	GENL. PURP. COMPUTERS	3.6	7	49.6	12.1
2210	ANALOG ELECT SWITCH	7.3	0	48.6	7.0
2210	CROSSBAR #	---	-11	50.1	---
2210	DIGITAL ELECT SWITCH	10.8	10	24.1	6.1
2210	STEP-BY-STEP @	---	-11	72.9	---
2220	OPERATOR SYSTEMS	8.6	1	47.3	6.0
2230	ANALOG CIRCUIT-OTH	5.7	-4	53.5	8.9
2230	DIGITAL CIRCUIT-OTH	7.2	1	35.8	8.8
2230	DIGITAL DATA SYSTEMS	5.3	0	60.0	7.5
2230	RADIO	8.9	3	41.6	6.2
2311	STATION APPARATUS	6.9	-1	44.0	8.3
2341	LPBX	5.6	-2	50.1	9.3
2351	PUBLIC TELEPHONE	4.6	2	66.6	6.8
2362	OTHER TERMINAL EQUIP	5.0	-2	49.5	10.5
2411	POLES	18.0	-125	59.1	9.2
2421	AERIAL CABLE-EXCH	13.6	-43	48.7	6.9
2421	AERIAL CABLE-TOLL	3.9	-9	9.3	25.6
2422	UG CABLE-EXCH FIBER	19.1	-5	13.9	4.8
2422	UG CABLE-EXCH METAL	16.6	-29	34.3	5.7
2422	UG CABLE-TOLL FIBER	15.1	-5	30.1	5.0
2422	UG CABLE-TOLL METAL	7.3	-25	48.5	10.5
2423	BURIED CABLE-EXCH MET	14.2	-13	44.7	4.8
2423	BURIED CABLE-TOLL MET	9.3	-2	43.8	6.3
2423	BURIED CA-EXCH FIBER	22.0	-5	12.8	4.2
2423	BURIED CA-TOLL FIBER	16.7	-5	21.5	5.0
2424	SUBMARINE CABLE	15.0	-2	42.6	4.0
2426	INTRABLDG NTWK CABLE	12.0	-17	51.4	5.5
2431	AERIAL WIRE-EXCH	4.1	-79	126.1	12.9
2441	CONDUIT SYSTEMS	51.0	-6	20.2	1.7

The figures in Columns B, C, and D are percentages of gross book cost.

The net service value for Crossbar Account is to be amortized over a twenty-four month period ending December 31, 1993.

@ The net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending December 31, 1994.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - IOWA

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		4.6	11	45.5	9.5
2114	SPEC PURPOSE VEHICLE		15.0	10	0.0	6.0
2115	GARAGE WORK EQUIP		9.6	0	24.3	7.9
2116	OTHER WORK EQUIP		9.9	10	46.1	4.4
2121	BUILDINGS		28.0	7	22.9	2.5
2122	FURNITURE		---	1	99.0	5.0
2123	OFFICE EQUIPMENT		5.5	0	83.2	3.1
2123	COMPANY COMM EQUIP		3.4	0	57.3	12.6
2124	GEN PURPOSE CMPTR		3.0	5	64.5	10.2
2211	ANALOG SW EQUIP		5.7	3	51.7	7.9
2212	DIGITAL SW EQUIP		11.1	4	19.1	6.9
2215	CROSSBAR SW EQUIP		---	0	100.0	5.0
2215	STEP BY STEP EQUIP		---	-1	101.0	5.0
2220	OPERATOR SYSTEMS-NEW		8.0	5	0.0	11.9
2220	OPERATOR SYSTEMS-OLD	a	---	5	53.9	---
2231	RADIO SYSTEMS		5.2	-4	59.0	8.7
2232	CIRCUIT ANALOG		4.4	-5	51.0	12.3
2232	CIRCUIT DDS		5.3	0	13.2	16.4
2232	CIRCUIT DIGITAL		6.6	0	28.4	10.8
2351	PUB TEL TERM EQUIP		6.1	5	36.0	9.7
2362	OTHER TERM EQUIP		5.0	4	47.4	9.7
2411	POLE LINES		8.4	-64	150.7	1.6
2421	AERIAL CABLE MET		8.5	-24	82.4	4.9
2421	AERIAL CABLE NON MET		16.2	-26	-7.9	8.3
2422	UNDGRD CABLE MET		15.0	-26	55.1	4.7
2422	UNDGRD CABLE NON MET		18.1	-19	18.7	5.5
2423	BURIED CABLE MET		13.6	-13	54.2	4.3
2423	BURIED CABLE NON MET		21.0	-7	14.2	4.4
2424	SUB CABLE MET		4.2	-5	81.0	5.7
2424	SUB CABLE NON MET		23.0	-5	14.3	3.9
2426	INTRA BLDG CA MET		10.1	-21	80.8	4.0
2426	INTRA BLDG NON MET		15.3	-16	28.8	5.7
2431	AERIAL WIRE		3.5	-31	76.4	15.6
2441	CONDUIT SYSTEMS		33.0	-18	53.4	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

a The net service value for the Operator Systems-Old Account is to be amortized over a twenty-four month period ending December 31, 1993.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - MINNESOTA

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		4.8	9	47.6	9.0
2113	AIRCRAFT		---	35	65.0	5.0
2114	SPEC PURPOSE VEHICLE		7.6	10	53.5	4.8
2115	GARAGE WORK EQUIP		11.2	0	-36.0	12.1
2116	OTHER WORK EQUIP		10.7	10	41.1	4.6
2121	BUILDINGS		31.0	6	17.1	2.5
2122	FURNITURE		---	1	99.0	5.0
2123	OFFICE EQUIPMENT		8.3	0	46.7	6.4
2123	COMPANY COMM EQUIP		4.7	0	42.9	12.1
2124	GEN PURPOSE CMPTR		3.0	5	64.2	10.3
2211	ANALOG SW EQUIP		5.1	2	45.5	10.3
2212	DIGITAL SW EQUIP		10.7	3	18.5	7.3
2215	CROSSBAR SW EQUIP	@	---	-1	76.7	---
2215	STEP BY STEP EQUIP	@	---	-1	85.6	---
2220	OPERATOR SYSTEMS-NEW		8.0	5	0.0	11.9
2220	OPERATOR SYSTEMS-OLD	*	---	5	59.3	---
2231	RADIO SYSTEMS		5.9	-5	49.1	9.5
2232	CIRCUIT ANALOG		3.7	0	44.9	14.9
2232	CIRCUIT DDS		6.0	0	-5.2	17.5
2232	CIRCUIT DIGITAL		7.2	0	33.1	9.3
2351	PUBLIC TEL TERM EQUIP		5.5	5	56.2	7.1
2362	OTHER TERM EQUIP		4.2	7	56.2	8.8
2411	POLE LINES		6.5	-60	139.8	3.1
2421	AERIAL CABLE MET		9.7	-24	64.7	6.1
2421	AERIAL CABLE NON MET		14.7	-15	-87.0	13.7
2422	UNDGRD CABLE MET		15.6	-8	43.4	4.1
2422	UNDGRD CABLE NON MET		18.3	-11	16.3	5.2
2423	BURIED CABLE MET		13.7	-13	43.9	5.0
2423	BURIED CABLE NON MET		21.0	-11	14.4	4.6
2424	SUB CABLE MET		8.7	-1	68.4	3.7
2424	SUB CABLE NON MET		23.0	-1	19.9	3.5
2426	INTRA BLDG MET		10.4	-14	74.1	3.8
2426	INTRA BLDG NON MET		17.6	-11	20.6	5.1
2431	AERIAL WIRE		4.0	-29	60.0	17.3
2441	CONDUIT SYSTEMS		37.0	-18	37.6	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service values for the Crossbar Switching and Step-by-Step Switching accounts are to be amortized over a thirty-six month period ending December 31, 1994.

* The net service value for the Operator Systems-Old Account is to be amortized over a twelve month period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - NEBRASKA

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		5.7	12	55.0	5.8
2114	SPEC PURPOSE VEHICLE		10.3	10	40.5	4.8
2115	GARAGE WORK EQUIP		8.4	0	-7.1	12.8
2116	OTHER WORK EQUIP		10.1	12	43.5	4.4
2121	BUILDINGS		32.0	3	19.2	2.4
2122	FURNITURE		---	5	95.0	5.0
2123	OFFICE EQUIPMENT		8.3	3	31.4	7.9
2123	COMPANY COMM EQUIP		4.9	0	19.6	16.4
2124	GEN PURPOSE CMPTR		3.0	0	51.8	16.1
2211	ANALOG SW EQUIP		5.5	2	35.4	11.4
2212	DIGITAL SW EQUIP		10.4	3	21.7	7.2
2215	CROSSBAR SW EQUIP	@	---	-6	100.1	---
2215	STEP BY STEP EQUIP		---	-3	103.0	5.0
2220	OPERATOR SYSTEMS-NEW		8.0	5	0.0	11.9
2220	OPERATOR SYSTEMS-OLD	*	---	5	55.3	---
2231	RADIO SYSTEMS		4.9	-7	57.1	10.2
2232	CIRCUIT ANALOG		5.6	-5	56.4	8.7
2232	CIRCUIT DDS		5.3	-4	13.5	17.1
2232	CIRCUIT DIGITAL		6.8	0	28.5	10.5
2351	PUB TEL TERM EQUIP		4.6	5	53.8	9.0
2362	OTHER TERM EQUIP		4.4	8	54.1	8.6
2411	POLE LINES		7.0	-75	70.3	15.0
2421	AERIAL CABLE MET		7.7	-30	74.7	7.2
2421	AERIAL CABLE NON MET		19.6	-35	-80.4	11.0
2422	UNDGRD CABLE MET		15.0	-24	52.3	4.8
2422	UNDGRD CABLE NON MET		18.6	-15	12.6	5.5
2423	BURIED CABLE MET		13.3	-13	52.9	4.5
2423	BURIED CABLE NON MET		21.0	-11	11.1	4.8
2424	SUB CABLE MET		14.3	-1	48.5	3.7
2424	SUB CABLE NON MET		23.0	-1	8.6	4.0
2426	INTRA BLDG CA MET		8.7	-25	68.0	6.6
2426	INTRA BLDG NON MET		16.6	-23	34.1	5.4
2431	AERIAL WIRE		3.5	-34	82.6	14.7
2441	CONDUIT SYSTEMS		36.0	-18	40.2	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Crossbar Switching Account is to be amortized over a twelve month period ending December 31, 1992.

* The net service value for the Operator Systems-Old Account is to be amortized over a twenty-four period ending December 31, 1993.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - NORTH DAKOTA

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		5.1	14	47.7	7.5
2114	SPEC PURPOSE VEHICLE		14.0	10	0.0	6.4
2115	GARAGE WORK EQUIP		11.4	0	-314.2	36.3
2116	OTHER WORK EQUIP		9.0	12	51.5	4.1
2121	BUILDINGS		21.0	10	20.5	3.3
2122	FURNITURE		---	1	99.0	5.0
2123	OFFICE EQUIPMENT		6.9	0	62.0	5.5
2123	COMPANY COMM EQUIP		4.0	0	65.9	8.5
2124	GEN PURPOSE CMPTR		2.9	5	66.2	9.9
2211	ANALOG SW EQUIP		3.8	0	49.8	13.2
2212	DIGITAL SW EQUIP		10.7	4	17.8	7.3
2215	CROSSBAR SW EQUIP		---	-2	102.0	5.0
2215	STEP BY STEP EQUIP	@	---	-2	95.6	---
2220	OPERATOR SYSTEMS-NEW		8.0	5	0.0	11.9
2220	OPERATOR SYSTEMS-OLD	*	---	5	60.9	---
2231	RADIO SYSTEMS		5.4	-6	54.5	9.5
2232	CIRCUIT ANALOG		3.1	-2	40.9	19.7
2232	CIRCUIT DDS		7.0	0	2.1	14.0
2232	CIRCUIT DIGITAL		7.0	0	23.5	10.9
2351	PUB TEL TERM EQUIP		3.5	5	57.8	10.6
2362	OTHER TERM EQUIP		5.2	3	42.3	10.5
2411	POLE LINES		7.9	-100	139.3	7.7
2421	AERIAL CABLE MET		7.8	-40	81.9	7.4
2421	AERIAL CABLE NON MET		17.2	-40	56.3	4.9
2422	UNDGRD CABLE MET		15.6	-5	53.0	3.3
2422	UNDGRD CABLE NON MET		21.0	-17	18.8	4.7
2423	BURIED CABLE MET		15.3	-11	50.6	3.9
2423	BURIED CABLE NON MET		22.0	-11	9.2	4.6
2424	SUB CABLE MET		12.3	0	52.1	3.9
2424	SUB CABLE NON MET		25.0	0	0.0	4.0
2426	INTRA BLDG CA MET		8.2	-14	73.3	5.0
2426	INTRA BLDG NON MET		17.4	-11	7.8	5.9
2431	AERIAL WIRE		3.6	-28	0.0	35.6
2441	CONDUIT SYSTEMS		38.0	-18	34.8	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Step-by-Step Switching Account is to be amortized over a twelve month ending December 31, 1992.

* The net service value for the Operator Systems-Old Account is to be amortized over a thirty-six month period ending December 31, 1994.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - SOUTH DAKOTA

Effective January 1, 1992

	Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		3.4	16	59.7	7.1
2114	SPEC PURPOSE VEHICLE		14.0	10	0.0	6.4
2115	GARAGE WORK EQUIP		10.4	0	-0.7	9.7
2116	OTHER WORK EQUIP		9.2	10	52.1	4.1
2121	BUILDINGS		22.0	10	-29.9	5.5
2122	FURNITURE		---	3	97.0	5.0
2123	OFFICE EQUIPMENT		5.1	0	86.2	2.7
2123	COMPANY COMM EQUIP		3.8	0	72.2	7.3
2124	GEN PURPOSE CMPTR		2.6	5	68.2	10.3
2211	ANALOG SW EQUIP		6.3	2	42.4	8.8
2212	DIGITAL SW EQUIP		10.4	3	20.1	7.4
2215	CROSSBAR SW EQUIP		---	-3	103.0	5.0
2215	STEP BY STEP EQUIP		---	0	100.0	5.0
2220	OPERATOR SYSTEMS-NEW		8.0	5	0.0	11.9
2220	OPERATOR SYSTEMS-OLD	@	---	5	54.4	---
2231	RADIO SYSTEMS		5.6	-2	39.4	11.2
2232	CIRCUIT ANALOG		4.2	-5	39.9	15.5
2232	CIRCUIT DDS		6.7	0	-4.4	15.6
2232	CIRCUIT DIGITAL		6.7	0	24.2	11.3
2351	PUB TEL TERM EQUIP		3.5	5	74.5	5.9
2362	OTHER TERM EQUIP		5.4	0	24.9	13.9
2411	POLE LINES		8.7	-62	107.1	6.3
2421	AERIAL CABLE MET		8.5	-30	81.8	5.7
2421	AERIAL CABLE NON MET		17.9	-32	12.5	6.7
2422	UNDGRD CABLE MET		16.4	-15	47.9	4.1
2422	UNDGRD CABLE NON MET		18.0	-11	22.3	4.9
2423	BURIED CABLE MET		14.0	-10	53.3	4.1
2423	BURIED CABLE NON MET		21.0	-7	14.5	4.4
2424	SUB CABLE MET		12.2	0	54.5	3.7
2424	SUB CABLE NON MET		23.0	0	6.7	4.1
2426	INTRA BLDG CA MET		8.8	-8	69.9	4.3
2426	INTRA BLDG NON MET		19.6	-7	8.7	5.0
2431	AERIAL WIRE		3.5	-27	84.7	12.1
2441	CONDUIT SYSTEMS		39.0	-10	31.5	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Operator Systems-Old Account is to be amortized over a twelve month period ending December 31, 1992.

Effective January 1, 1992

Rate Category Description			Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES		5.1	15	32.5	10.3
2115	GARAGE EQUIPMENT		6.3	0	35.3	10.3
2116	OTHER WORK EQUIPMENT		7.9	5	36.4	7.4
2121	BUILDINGS		24.0	0	25.2	3.1
2122	FURNITURE		13.9	5	22.8	5.2
2123	OFFICE SUPPORT EQUIP		9.9	5	22.4	7.3
2123	OFFICIAL COMM EQUIP		3.3	0	73.7	8.0
2124	GEN PURPOSE COMPUTERS		3.3	5	50.5	13.5
2211	ANALOG ELEC SWITCH	#	---	-2	93.7	---
2212	DIGITAL ELEC SWITCH		9.0	3	27.2	7.8
2212	DIGITAL ELEC 1210'S	@	---	0	43.4	---
2231	RADIO FAC-MOBILE		6.4	-10	68.1	6.5
2231	RADIO FAC-OTHER		6.4	0	60.1	6.2
2232	CIRCUIT EQPT-ANALOG		4.9	0	39.9	12.3
2232	CIRCUIT EQPT-DIGITAL		8.5	5	39.2	6.6
2351	PUBLIC TELEPHONE		4.9	2	56.2	8.5
2362	SUBSCRIBER MULTIPLEX		---	0	100.0	5.0
2362	LINE CONDITIONING		1.9	0	85.4	7.7
2411	POLES		18.8	-25	38.1	4.6
2421	AER CABLE-METALLIC		17.1	-17	36.8	4.7
2421	AER CABLE-NONMETALLIC		19.6	-14	10.8	5.3
2422	UNDG CA-METALLIC		19.0	-24	41.7	4.3
2422	UNDG CA-NONMETALLIC		27.0	-14	12.3	3.8
2423	BUR CABLE-METALLIC		14.4	-9	41.7	4.7
2423	BUR CABLE-NONMETALLIC		21.0	-5	11.7	4.4
2424	SUBMARINE CABLE		---	0	100.0	5.0
2426	INTRABUILDING NETWK CA		11.7	-25	19.0	9.1
2431	AERIAL WIRE		3.8	-55	107.3	12.6
2441	CONDUIT SYSTEMS		33.0	-5	26.3	2.4

The figures in Columns B, C, and D are percentages of gross book cost.

The net service value for the Analog Electronic Switching Account is to be amortized over a twelve month period ending December 31, 1992.

@ The net service value for the Digital Electronic 1210 Account is to be amortized over a twenty-four month period ending December 31, 1993.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED TELEPHONE-SOUTHEAST, INC. - VIRGINIA

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	4.3	15	32.0	12.3
2115	GARAGE EQUIPMENT	6.2	0	37.0	10.2
2116	OTHER WORK EQUIPMENT	8.0	0	53.1	5.9
2121	BUILDINGS	17.7	0	35.1	3.7
2122	FURNITURE	8.8	5	-293.9	44.2
2123	OFFICE SUPPORT EQUIP	10.6	5	28.1	6.3
2123	OFFICIAL COMM EQUIP	3.1	0	83.2	5.4
2124	GEN PURPOSE COMPUTERS	4.3	5	46.1	11.4
2212	DIGITAL ELEC SWITCH	9.0	3	29.1	7.5
2215	STEP-BY-STEP	2.2	0	77.5	10.2
2215	CROSSBAR	2.2	0	78.9	9.6
2231	RADIO FAC-MOBILE	6.0	-10	60.9	8.2
2231	RADIO FAC-OTHER	7.0	0	51.7	6.9
2232	CIRCUIT EQPT-ANALOG	6.1	0	39.5	9.9
2232	CIRCUIT EQPT-DIGITAL	8.7	5	35.4	6.9
2351	PUBLIC TELEPHONE	5.1	2	56.1	8.2
2362	SUBSCRIBER MULTIPLEX	---	0	100.0	5.0
2362	LINE CONDITIONING	3.3	0	93.1	2.1
2411	POLES	15.1	-35	46.6	5.9
2421	AER CABLE-METALLIC	17.1	-33	40.7	5.4
2421	AER CABLE-NONMETALLIC	18.0	-11	8.1	5.7
2422	UNDG CA-METALLIC	17.2	-23	44.7	4.6
2422	UNDG CA-NONMETALLIC	21.0	-12	7.8	5.0
2423	BUR CABLE-METALLIC	12.0	-3	37.9	5.4
2423	BUR CABLE-NONMETALLIC	21.0	-3	6.3	4.6
2426	INTRABUILDING NETWK CA	15.0	-35	14.8	8.0
2431	AERIAL WIRE	4.4	-60	110.8	11.2
2441	CONDUIT SYSTEMS	31.0	0	33.'	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED TELEPHONE-SOUTHEAST, INC. - WEST VIRGINIA

Effective January 1, 1992

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate
		(years)	(%)	(%)	(%)
		A	B	C	D=(100%-B-C)/A
2121	BUILDINGS	18.2	0	9.4	5.0
2232	CIRCUIT EQPT-DIGITAL	12.0	2	14.6	7.0
2421	AER CABLE-NONMETALLIC	28.0	-20	7.6	4.0

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
WISCONSIN BELL, INC.

Effective January 1, 1992

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	2.8	13	79.6	2.6
2115	GARAGE WORK EQUIPMENT	8.9	-80	12.9	18.8
2116	OTHER WORK EQUIPMENT	8.8	4	34.3	7.0
2121	BUILDINGS	29.0	5	19.8	2.6
2122	FURNITURE	8.7	12	22.6	7.5
2123	OFFICE SUPPORT EQ	6.4	16	24.8	9.3
2123	COMPANY COMM EQ	5.6	-5	61.5	7.8
2124	GEN PURPOSE COMPUTERS	2.8	4	67.9	10.0
2211	ANALOG ELEC SWITCHING	3.0	0	54.4	15.2
2212	DIGITAL ELEC SWITCHING	10.2	4	22.4	7.2
2220	OPERATOR SYSTEMS	6.1	0	58.1	6.9
2231	RADIO SYSTEMS	3.7	0	30.7	18.7
2232	DIGITAL CIRCUIT	6.4	2	38.4	9.3
2232	DIGITAL DATA SERVICES	4.2	1	50.1	11.6
2232	ANALOG CIRCUIT	4.1	-3	47.8	13.5
2351	PUBLIC TEL TERM EQ	4.5	0	70.0	6.7
2362	OTHER TERM EQ	4.4	-1	22.5	17.8
2411	POLES	20.0	-74	64.3	5.5
2421	AERIAL CABLE	13.0	-18	48.1	5.4
2422	UG CABLE-NONMETALLIC	17.6	-21	18.6	5.8
2422	UG CABLE-METALLIC	16.5	0	36.7	3.8
2423	BUR CABLE-NONMETALLIC	21.0	-7	15.6	4.4
2423	BUR CABLE-METALLIC	12.4	-9	39.5	5.6
2424	SUBMARINE CABLE	10.4	0	37.6	6.0
2426	INTRABUILDING CABLE	11.5	-18	40.9	6.7
2441	CONDUIT SYSTEMS	43.0	-15	36.2	1.8

The figures in Columns B, C, and D are percentages of gross book cost.

*U.S. Government Printing Office: 1993 — 342-145/80011